80-2137

No. .....

IN THE

Supreme Court of the United States

October Term, 1980.

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ALEXANDER L. STEVAS,
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CHESTER C. DAVIS, DAVIS & COX, MAXWELL E. COX, HOWARD M. JAFFE, and D. MARTIN COOK,

Petitioners,

vs.

SUMMA CORPORATION, HUGHES PROPERTIES, INC., and HUGHES AIR CORP.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

ROBERT F. LEWIS,
R. GAYLORD SMITH,
MARY G. WHITAKER,
LEWIS, D'AMATO, BRISBOIS & BISGAARD,
Five Park, Suite 300,
261 South Figueroa Street,
Los Angeles, Calif. 90012,
(213) 627-7777,

CHESTER C. DAVIS,
HOWARD M. JAFFE,
DAVIS & COX,
1900 Avenue of the Stars,
Suite 1450,
Los Angeles, Calif. 90067,
(213) 553-3244,

Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

Questions Presented.

1. Whether the standard applied by the Ninth Circuit for pleading fraud under Rule 9(b), Fed.R.Civ.P., is improperly permissive and lax.

2. Whether the Ninth Circuit exceeded the bounds of proper appellate review in deciding that the trial court had abused its discretion in dismissing respondents' counterclaims under Rule 41(b), Fed.R.Civ.P., for noncompliance with Rule 9(b), Fed.R.Civ.P.

3. Whether the trial court properly issued an injunction to stay proceedings in state court in order to protect and effectuate its judgment of dismissal under Rule 41(b), Fed.R.Civ.P.

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IN THE

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CHESTER C. DAVIS, DAVIS & COX, MAXWELL E. COX, HOWARD M. JAFFE, and D. MARTIN COOK,

Petitioners,

vs.

SUMMA CORPORATION, HUGHES PROPERTIES, INC., and HUGHES AIR CORP.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Petitioners, CHESTER C. DAVIS, DAVIS & COX, MAXWELL E. COX, HOWARD M. JAFFE, and D. MARTIN COOK,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 16, 1981.

[1]Also parties to the decision below were Frank W. Gay, Nadine Henley Marshall, Kay Gibbons Glenn, Howard Lorenzo Eckersley, John Morrison Holmes, Levar Beebe Myler, James H. Rickard, Clarence Albert Waldron and Wilbur Sutton Thain, M.D. They are not petitioners herein.

Opinion Below.

The memorandum opinion of the Court of Appeals, which is unpublished, appears in Appendix A hereto. No opinion was rendered by the District Court for the Central District of California.

Jurisdiction.

The judgment of the Court of Appeals for the Ninth Circuit was entered on March 16, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Rules and Statutory Provisions Involved.

Fed.R.Civ.P., Rule 9(b):

Fraud, mistake, condition of the mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

Fed.R.Civ.P., Rule 41(b):

Involuntary Dismissal: Effect thereof. For failure of the plaintiff to prosecute or to comply these rules or any order of court, a defendant may move for a dismissal of an action or of any claim against him . . .

United States Code, Title 28:

§ *2283. Stay of State Court Proceedings.* A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

Statement of the Case.

Much litigation has arisen following the death of Howard R. Hughes, Jr., on April 5, 1976. One of the more publicized[2] aspects of this avalanche of litigation is the counterclaims asserted by respondents Summa Corporation and related entities ("Summa") against Mr. Hughes' long-time attorney and petitioner herein, Chester C. Davis, and his associates, petitioners Maxwell E. Cox, Howard M. Jaffe and D. Martin Cook and the law firm of Davis & Cox. The principal question raised by this petition is whether the Court of Appeals incorrectly determined that the trial court abused its discretion in dismissing respondents' counterclaims under Rule 41(b), Fed.R.Civ.P., for non-compliance with Rule 9(b) of the Fed.R.Civ.P.

Respondents' counterclaims, which are reproduced in their entirety (but without the bulky exhibits) in Appendix B hereto, allege an amorphous tort claim sounding in fraud against many of Mr. Hughes' former attorneys, doctors, personal aides and executives; all are sued for all things. Among the material expressly incorporated by reference in the counterclaims (*see*, App. B, ¶ 57(n)) are respondents' answers to certain interrogatories which explicitly allege that petitioners in some manner were guilty of deceiving Mr. Hughes; the pertinent interrogatory answers are set forth in Appendix C hereto.

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[2]For example, see "Suit Accuses 13 of Move to Control Hughes Empire," Los Angeles Times, July 17, 1979, p. 3; "Summa Sues Hughes' Aides for $230 Million," Las Vegas Review-Journal, July 18, 1979, p. 1; "Summa Sues Davis, Gay," Las Vegas Sun, July 18, 1979; "Summa Revives Lawsuit," Las Vegas Sun, July 10, 1979, p. 6. "Ex-Hughes Aides Accused of Plot," The New York Times, January 25, 1979, p. A-16; "Legal Dispute Over Howard Hughes' Newly Profitable Empire is Approaching Climax," The New York Times, June 3, 1979, p. 14; "$50 Million Suit Charges Howard Hughes Aides Let Him Die Like a Skid Row Bum," National Enquirer, April 17, 1979.

Respondents' counterclaims rest upon the central allegation that petitioners and others "conspired among themselves to, and did, gain control of Hughes' personal and corporate assets, including Summa, Hughes Properties and their assets, for their personal benefit and misappropriate such assets to their own use or to the use of others." (App. B, ¶ 57). Petitioners' role in this scheme to rape a corporation through manipulation of its supposedly deluded sole stockholder is generally described as follows in the counterclaims:

(A) *The Maheu Problem*: As general counsel to Summa from 1961 until after Mr. Hughes' death, petitioner Davis was in overall charge of the defense of Hughes Tool Company, as it was then known, in the antitrust litigation which culminated in this court's opinion in *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363 (1973).[3] (App. B, ¶50). In late 1970, Robert Maheu, then in charge of Mr. Hughes' Nevada operations, sought to disengage Davis as counsel in the TWA matter.

(B) *Maheu's Ouster and the Consolidation of Power*: On November 14, 1970, petitioner Davis and others under "mysterious" circumstances are alleged to have "improperly obtained" a proxy from Mr. Hughes which gave them complete power over the Nevada operations. (App. C, p. 45; App. B, ¶52). There is no particularization in the pleading as to what the improper circumstances were which induced Mr. Hughes to issue this proxy. The next event in

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[3]The history of the TWA litigation illustrates well the desirability of a decision of determinative issues raised by the pleadings at the earliest appropriate time. The precise antitrust immunity issue which was the foundation of this court's opinion in 1973 was the subject of a certiorari petition granted 7 years before, 379 U.S. 912 (1965), but after argument dismissed as "improvidently granted". 380 U.S. 248, 249 (1965). See, *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. at 393 (Burger, C.J., dissenting).

this tale is the allegation of "inducing" Mr. Hughes by "undue influence or improper means" (none of which are specified; nor are petitioners' involvement therewith identified) to exile himself from the United States after the Maheu ouster until his death. (App. B, ¶54). Mr. Hughes was further induced, it is alleged, to issue another proxy on December 12, 1972 appointing Davis among others to Summa's Board of Directors; again, there is no particularization as to what petitioner Davis did wrong or what involvement he had with regard to Mr. Hughes' decision to issue this proxy (App. B, ¶57(i)). Two days later Davis allegedly obtained the resignation of nine other directors who left the company upon the sale of the Oil Tool Division which became a publicly held company assuming the name of "Hughes Tool Company." (App. B, ¶ 57(j); App. C, p. 46). A third proxy was issued by Hughes on December 22, 1972, again allegedly induced by undue influence or other improper means, none of which is particularized in terms of what was wrong or petitioners' involvement therewith.

After Respondents filed their original counterclaims, which made liberal use of the word "fraud," in the trial court, petitioners moved to dismiss them under Rule 9(b) of the Federal Rules for failure to plead with sufficient particularity. Before the court ruled on the motion, respondents filed an amended counterclaim which consisted of the same claims about the deception of Mr. Hughes but this time deleted use of the word "Fraud". Another motion to dismiss was filed, and the district court then granted it on the theory that the gravamen of the counterclaims was still of form of fraud, but granted with leave to amend. When respondents thereafter filed a Second Amended Counterclaim which was virtually identical to the previously dismissed counterclaim, the trial court then dismissed with

prejudice under Rule 41(b)[4] for failure to comply with Rule 9(b). The dismissal order was entered as a final judgment under Rule 54(b). Shortly thereafter, the trial court enjoined respondents from pursuing its counterclaims in a similar action then pending in Nevada state court.

On March 16, 1981, the Ninth Circuit reversed the judgment of the trial court, finding that the court had "abused its discretion" in dismissing the counterclaims under Rule 41(b) for lack of compliance with Rule 9(b).[5] Apparently concluding that the counterclaims "could be read to penetrate the ill-defined penumberal area surrounding common law fraud," the court nonetheless found that "Summa has set forth much more than conclusory allegations. It has included the time, place and nature of many of the alleged wrongful activities, including those supported by information and belief." (App. A, p. 8). Nowhere in the opinion of the Court of Appeals is there any identification of what wrongful activities are attributable to petitioners, much less a description of the details thereof.

Reasons for Granting the Writ.

The decision below is indicative of the lax approach followed by the Ninth and Seventh Circuits as to what the particularity requirement of Rule 9(b) really means. *Bosse v. Crowell, Collier and MacMillian*, 565 F.2d 602, 611 (9th Cir., 1977); *Tomera v. Galt*, 511 F. 2d 504, 508 (7th Cir., 1975); *Walling v. Beverly Enterprises*, 476 F.2d 393, 397 (9th Cir., 1973). This contrasts with the much stricter approach endorsed in other circuits, especially the Second Circuit where Rule 9(b) has been used effectively to abort potentially time consuming but unmeritorious complex lit-

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[4]And under Rule 12(b)(6) as well.

[5]The court did not reach the question of the propriety of the dismissal under Rule 12(b)(6). See Appendix A, footnote 3.

igations. *Denny v. Barber*, 576 F.2d 465 (2d Cir., 1978); *Segal v. Gordon*, 467 F.2d 602 (2d Cir., 1972).

This court has not construed Rule 9(b) of the Federal Rules of Civil Procedure since its adoption. Certiorari is appropriate for important questions in the administration of the Federal Rules of Civil Procedure. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 251 (1957).

A. The Decision Below Conflicts With the More Rigorous Applications of Rule 9(b), Fed.R.Civ.P., Illustrated in the Decisions of Other Courts of Appeals.

In reversing the trial court, the Ninth Circuit applied an unjustifiably permissive standard for applying Rule 9(b); it concluded that the "primary purpose of the rule is to identify 'the circumstances surrounding the fraud so that the defendant can prepare an adequate answer from the allegations.' " (App. A, p. 5). The Ninth Circuit had previously expressed this narrow view of Rule 9(b) in *Walling v. Beverly Enterprises, supra*, at 397.

The Ninth Circuit is wrong; even Rule 8, Fed.R.Civ.P. requires a sufficient identification of circumstances in non-Rule 9(b) cases so that a defendant can prepare a responsive pleading. Presumably, therefore, Rule 9(b) must mean something more. In finding only that petitioners "have been more than advised of the nature of the claim that they must answer" (App. A, p. 8), the decision below allows respondents the luxury of avoiding the more exacting requirements articulated in decisions of other courts of appeals, such as:

(i) The attribution of specific misconduct against specific defendants (*United States v. Cannon*, 642 F.2d 1373, 1385-1386, (D.C. Cir., 1981); *Goldberg v. Meridor*, 81 F.R.D. 105, 111 (S.D.N.Y. 1979));

(ii) Avoidance of "information and belief" allegations (*Segal v. Gordon, supra* at 608);

(iii) Reliance on something more than allegations of "neutral conduct" — no matter what legal conclusions are inserted as linguistic modifiers. (*Decker v. Massey-Ferguson Ltd.*, 29 Fed.R.Serv.2d 239, 241 (S.D.N.Y. 1979); *Spiegler v. Wills*, 60 F.R.D. 681, 683 (S.D.N.Y. 1973)).

The decision below neglects to mention most of the above principles, and it fails to apply any of them to respondents' counterclaims. In the Ninth and Seventh Circuits, Rule 9(b) is seen as limited to serving a slightly beefed up notice pleading function. "Rule 9 lists the actions in which slightly more is needed for notice." *Tomera v. Galt, supra,* 511 F.2d at 508. But in other circuits it is viewed as bulwark protecting individual litigants from professionally disastrous charges of fraudulent misconduct. *Ross v. A.H. Robins Co.*, 607 F.2d 545, 557 (2d Cir. 1979); *Segal v. Gordon, supra,* 467 F.2d at 607. Moreover, a strong, vibrant construction of Rule 9(b) is entirely consistent with reducing the clog on the court — one that can be financially ruinous to individual litigants — represented by largely groundless claims which simply take up the time of other people. *Denny v. Barber, supra,* 576 F.2d at 470; *cf., Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 741 (1975).

B. The Decision Below Conflicts With Decisions of This Court by Improperly Constricting the Area of the Trial Court's Discretion Under Rule 41(b) Fed.R.Civ.P.

Although the decision below correctly states that the standard of review as to the judgment of dismissal was whether there was an abuse of discretion, the memorandum opinion in fact shows nothing more than that the Court of Appeals would have been inclined in the first instance to

have ruled differently. Far from showing any "abuse" of discretion, the decision below even fails, as do the counterclaims themselves, to refer to any specific wrongdoing committed specifically by petitioners. The decision below fails to state why Rule 9(b) should be "relaxed", especially in view of the recitals in the counterclaims to the effect that the alleged conspiracy had been "discovered" by Summa's management a year before the counterclaims were filed. Moreover, the decision below fails to explain why a trial court has no discretion, after affording a pleader a meaningful opportunity to amend its counterclaims, to dismiss under Rule 41(b) upon the near contemptous refiling of a virtually identical pleading.

This court admonished Courts of Appeals not to conduct *de novo* review under the guise of applying the "abuse of discretion" standard in *Curtiss-Wright v. General Electric Company*, 100 Sup. Ct. 1460, 1466-67 (1980), there in connection with reviewing decisions to enter judgment under Rule 54(b). This court has likewise emphasized the limits of proper appellate review of discretionary decisions in discovery matters by the trial court. *National Hockey League v. Metropolitan Hockey, Inc.*, 427 U.S. 639, 643 (1976) (*per curiam*). There is no decision of this court suggesting than an appellate court has a freer reign to reverse the trial court's discretion under Rule 41(b). *See, Link v. Wabash Railroad Company*, 370 U.S. 626 (1962); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197 (1958); *Cf., Roadway Express, Inc. v. Pipper*, 100 Sup.Ct. 2455, 2463 (1980).

C. A Federal Court May Properly Enjoin State Court Proceedings Under the "Relitigation Exception" to 28 U.S.C. Section 2283 Irrespective of "Younger-Huffman" Considerations.

A question of importance to our federal system is the propriety of an injunction issued by a federal court pursuant to the proviso in 28 U.S.C. § 2283, the "anti-injunction

statute", which permits federal court to "protect and effectuate" its judgments. Notwithstanding respondents' argument that an injunction preventing them from re-litigating this matter in the state courts of Nevada would violate Younger-Huffman principles, the trial court nonetheless issued such an injunction to protect the final order of dismissal under Rule 41(b).

There appears to be a split of authority among the courts of appeal as to whether the exceptions delineated in the anti-injunction statute are subject to the limitations on the power of federal courts to enjoin state courts, described in *Younger v. Harris*, 401 U.S. 37 (1971) and *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). Compare *Lamb Enterprises, Inc. v. Kiroff*, 549 F.2d 1052, 1062 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977) with *International Association of Machinists and Aerospace Workers v. Nix*, 512 F.2d 125, 130 (5th Cir., 1975).

The trial court resolved this conflict in favor of the *Nix* case; the Ninth Circuit side-stepped it by reversing the judgment which had been the basis for the protective injunction. As we assert the Ninth Circuit's decision below was an unwarranted interference with the trial court's discretion, the issue of the propriety of the trial court's protective injunction is also properly before this court.

Conclusion.

For these reasons, a writ of certiorari should be issued to review the judgment and memorandum opinion of the Ninth Circuit.

Respectfully submitted,

ROBERT F. LEWIS,
R. GAYLORD SMITH,
MARY G. WHITAKER,
LEWIS, D'AMATO, BRISBOIS & BISGAARD,
CHESTER C. DAVIS,
HOWARD M. JAFFE,
DAVIS & COX,
Attorneys for Petitioners.

APPENDIX A.

Memorandum.

United States Court of Appeals for the Ninth Circuit.

Davis and Cox, a partnership, Plaintiff-Appellee, vs. Summa Corporation, a Delaware corporation, Defendant-Appellant.

Summa Corporation; Hughes Air Corporation d/b/a/ Hughes Airwest; and Hughes Properties, Inc., Counterclaimants-Appellants, vs. Davis and Cox, a partnership; Maxwell E. Cox; Howard M. Jaffe; D. Martin Cook; Chester C. Davis; Frank William Gay; Levar Beebe Myler; John Morrison Holmes, Jr.; Howard Lorenzo Eckersley; James H. Rickard; Wilbur Sutton Thain, M.D.; and Norman Francis Crane, M.D., Counterdefendants-Appellees. No. 80-5462, No. 80-5531, CV 79-2374-R.

Filed Mar. 16, 1981.

Appeal from the United States District Court for the Central District of California, Manuel L. Real, District Judge Presiding, Submitted November 5, 1980.

Before: CHAMBERS and ALARCON, Circuit Judges, and LARSON,* District Judge.

Davis and Cox filed this action in the United States District Court for the Central District of California to recover legal fees and costs allegedly owed to them by Summa Corporation. Summa, along with Hughes Air Corporation and Hughes Properties, Inc. ("Summa"), then filed a counterclaim, naming Davis and Cox, Maxwell Cox, Howard Jaffe, D. Martin Cook, Chester Davis, Frank Gay, Levar Myler, John Holmes, Jr., Howard Eckersley, James Rickard, Wilbur Thain, M.D., and Norman Crane, M.D. as

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*Honorable Earl R. Larson, United States Senior District Judge for the District of Minnesota, sitting by designation.

counterdefendants. Some of the counterdefendants are attorneys and businessmen who served on the Board of Directors of Summa and other Hughes companies and who, along with the late Howard R. Hughes, Jr.—the sole stockholder—controlled the affairs of the Hughes companies until Hughes' death in 1976. The remainder of the counterdefendants are legal advisers, aides, and doctors who worked for Summa. Several of them served primarily as personal attendants to Hughes until his death. The counterclaim concerns a series of allegedly improper activities which occurred during the ten-year period prior to Hughes' death. After Hughes' death, controlling interest in Summa and other Hughes companies passed, at least temporarily, to Hughes' intestate heirs. The allegations in the counterclaim are very similar to those in a complaint filed earlier in a state court in the State of Nevada. That action is currently pending.

Subsequent to the filing of the counterclaim in this action, the counterdefendants moved to dismiss the action under Rule 9(b) of the Federal Rules of Civil Procedure for failure to plead fraud with sufficient particularity. Before the court ruled on the motion, Summa filed an amended counterclaim, removing the fraud claims that were alleged in the original counterclaim. The district court then granted counterdefendants' motion dismissing the counterclaim without prejudice. Summa then filed a second amended counterclaim, and the district court again dismissed the counterclaim for failing to comply with Rule 9(b). The second dismissal, however, was with prejudice and was entered pursuant to Rule 12(b)(6) and Rule 41(b).[1] This order was then entered

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[1]Rule 41(b) provides:

"For failure of the plaintiff to prosecute or *to comply with these rules* or any order of the court, a defendant may move for dismissal of an action or of any claim against him." (Emphasis added).

under Rule 54(b) as a final judgment of dismissal against Summa.

To protect this final judgment, the district court later issued an order enjoining Summa from further pursuing the similar state action that was earlier filed in Nevada. The order was stayed pending this appeal by a three-judge panel of this Court on July 30, 1980.[2] Summa appeals both the order directing final judgment of dismissal of the second amended counterclaim and the order enjoining Summa from pursuing the Nevada action. For the reasons stated below, we disagree with the orders of the district court and, accordingly, we reverse.

Count One of the second amended counterclaim alleges that the counterdefendants conspired to gain control of Hughes' corporate and personal assets, and once they were in control, they misappropriated those assets for their personal benefit. This claim is grounded on breach of the fiduciary duties owed to Hughes, and breach of implied contractual duties of fairness and good faith. Counts Two and Three claim that excessive employment and consulting contracts for the counterdefendants were entered into and approved of in breach of fiduciary duties owed to Hughes and Summa. Count Two alleges that the directors of Summa approved their own contracts and Count Three alleges that the contracts were approved pursuant to the conspiracy. Count Four claims that the counterdefendant directors are liable for acts of waste, mismanagement, and negligence performed in connection with their operation of Summa. The claim is grounded on breach of fiduciary duties. Count Five is directed toward the attorneys and primarily alleges

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[2]Also stayed in that order were *Gay v. Summa Corp.*, CV-79-02974-R; *Holmes v. Summa Corp.*, CV-79-02973-R; *Davis v. Summa Corp.*, CV-79-2375-R. *Davis and Cox v. Summa Corp.*, CV 79-2374-R, was stayed by the court in a supplemental order issued on July 31, 1980.

legal malpractice and breach of the fiduciary and implied contractual duties owed to Hughes and Summa. Count Five also alleges that the attorneys' actions were part of the conspiracy.

The judgment of a district court in dismissing an action under Rule 41(b)[3] should be reversed only where it is apparent that the court abused its discretion. *Schmidt v. Hermann*, 614 F.2d 1221, 1224 (9th Cir. 1980); *Anderson v. Air West, Inc.*, 542 F.2d 522, 524 (9th Cir. 1976). *See* 9 Wright & Miller, *Federal Practice and Procedure: Civil* § 2376 at 248-49 (1971). This court has earlier interpreted that standard to mean that the district court should not be overturned unless there is "a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of relevant factors." *Anderson*, 542 F.2d at 524.

Rule 9(b) requires that "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." The particularity rule for fraud claims is an exception to the simplified general federal pleading requirements,[4] and thus "its scope of application should be construed narrowly and not extended to other legal theories or defenses." 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1298 (1969). The level of particularity demanded by the rule is not inflexible and

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[3]The district court also dismissed Summa's counterclaim pursuant to Rule 12(b)(6). Since the standard of review of a Rule 12(b)(6) dismissal is considerably more liberal than that under Rule 41(b), *see Conley v. Gibson*, 355 U.S. 41, 45 (1957); *Walling v. Beverly Enterprises*, 476 F.2d 393, 395 (9th Cir. 1973), and we find that the district court's Rule 41(b) order was erroneous, it is unnecessary for us to discuss the Rule 12(b)(6) ground for dismissal.

[4]*See* Rules 8(a) ("A pleading . . . shall contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief, ..." and 8(e)(1) ("Each averment of a pleading shall be simple, concise, and direct.").

depends to a large extent on the type of theory under which a cause of action is brought, the facts of a particular case, and the circumstances pleaded. *See* 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1298 (1969); 2A J. Moore, *Federal Practice* § 9.03 (1979). The primary purpose of the rule is to identify "the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Walling v. Beverly Enterprises*, 476 F.2d 393, 397 (9th Cir. 1973).

In its original counterclaim, Summa appeared to have based much of its cause of action on fraud. However, after counterdefendants raised the Rule 9(b) issue by motion, Summa amended its counterclaim and dropped its initial averments of common law fraud. Fraud is also not mentioned in the second amended counterclaim. Counterdefendants claim that Summa dropped the references to the word "fraud" merely to avoid compliance with Rule 9(b) and that the amended counterclaims are in all respects identical to the original counterclaim which alleged a scheme to defraud Howard Hughes and his companies.

It is true that "fraud" is a matter of some indefinite character, and that it is often difficult to deduce. The elements of a common law fraud claim are, on the other hand, well-defined. They include: "(1) a false representation (2) in reference to a material fact (3) made with knowledge of its falsity (4) and with the intent to deceive (5) with action taken in reliance upon the representation." *Pence v. United States*, 316 U.S. 332, 338 (1942) (quoted in *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976)). *See also Crocker-Citizens National Bank v. Control Metals Corp.*, 566 F.2d 631, 636 (9th Cir. 1977) (applying common law fraud claim under California law). It is the penumbral area surrounding common law fraud, however, that is more difficult to define for the purposes of Rule 9(b).

A complaint alleging a breach of fiduciary duty or a breach of the implied contractual duty of good faith toward an individual or a corporation may or may not allege fraud depending on the underlying conduct involved. *See United States v. Kearns*, 595 F.2d 729 (D.C. Cir. 1978); *Robison v. Caster*, 356 F.2d 924 (7th Cir. 1966). In many of these cases in which Rule 9(b) is found to be applicable, the claim is either one in which statutory fraud is claimed, *see Walling v. Beverly Enterprises, supra*, one in which the elements of common law fraud are directly pleaded, *see Crocker-Citizens National Bank v. Control Metals Corp., supra*, or one in which the claimant has admitted that fraud is being averred.[5] *See Robison*, 356 F.2d at 925. In such cases the difficult question of whether fraud is alleged is precluded. Summa's second amended counterclaim alleges claims of conspiracy to gain control of Hughes' assets, misappropriation of those assets, waste and mismanagement, and legal malpractice. Rather than basing these claims on the type of misrepresentation that constitutes common law fraud, Summa has chosen to pursue a theory of undue influence. Given the allegations concerning the physical and mental condition of Howard Hughes during this period, and his possible susceptibility to influence, we agree with Summa's belief that its allegations do not constitute a common law fraud claim.

To the extent, however, that Summa's allegations could be read to penetrate the ill-defined penumbral area surrounding common law fraud, we find that the counterclaim more than satisfies the dictates of Rule 9(b). Rule 9(b) must not be read to defeat the simple pleading requirements of

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[5]Counterdefendants' assertion that Summa, in its original counter-complaint, admitted that it was averring fraud belies the fact that a party has considerable discretion to amend its complaint. *See* Rule 15(a), Federal Rules of Civil Procedure.

Rule 8, *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 379 (2d Cir. 1974), *cert. den.*, 421 U.S. 976 (1975); *In Re Equity Funding Corporation of American Securities Litigation*, 416 F.Supp. 161, 181 (C.D. Cal. 1976), nor may it be used to require the pleading of detailed evidentiary matter. *Walling*, 476 F.2d at 397; 2A J. Moore, *Federal Practice* ¶ 9.03 (1979). Although mere conclusory allegations will not satisfy the particularity requirement, *Schmidt*, 614 F.2d at 1224, identification of the circumstances constituting the alleged fraud are sufficient. *Bosse v. Crowell, Collier and Macmillan*, 565 F.2d 602, 611 (9th Cir. 1977). Whenever possible, the time, place, and nature of the activities should be pleaded. *Gottreich v. San Francisco Investment Corp.*, 552 F.2d 866, 867 (9th Cir. 1977); *Walling*, 476 F.2d at 397. A description of the "bare bones" of an alleged fraudulent scheme has been found to be a sufficient pleading under Rule 9(b). *See Tomera v. Galt*, 511 F.2d 504, 508 (7th Cir. 1975).

Furthermore, courts have significantly relaxed the extent of the particularity requirement in certain factual circumstances. Less particular allegations of fraud have been found sufficient when insiders of a corporation possess relevant information about the circumstances that the claimants are unable to obtain, *Schlick*, 507 F.2d at 379; *Clairdale Enterprises v. C.I. Realty Investors*, 423 F.Supp. 257, 259 (S.D. N.Y. 1976); *Denny v. Carey*, 72 F.R.D. 574, 580 (E.D. Pa. 1976), or when the fraud is directed against a third party, *Allegaert v. Perot*, 78 F.R.D. 427 (S.D. N.Y. 1978), or when the events encompassing the alleged fraudulent activity have happened over a lengthy period of time and there are many individuals involved. *In Re Equity Funding*, 416 F.Supp. at 181; *Temple v. Haft*, 73 F.R.D. 49, 53 (D. Del. 1976); *Serpa v. Jolly King Restaurants, Inc.*, 62 F.R.D. 626, 635 (S.D. Cal. 1974). In addition, the

pleading of fraud by information and belief has been permitted when the facts supporting the belief have been detailed in the complaint. *Schlick*, 507 F.2d at 379; *Segal v. Gordon*, 467 F.2d 602, 608 (2d Cir. 1972).

In its second amended counterclaim, Summa has set forth much more than conclusory allegations. It has included the time, place, and nature of many of the alleged wrongful activities, including those supported by information and belief. In other instances, it is readily apparent that Summa is unable to detail some of the circumstances since the information is peculiarly within the possession of the counterdefendants. The intensely guarded and somewhat unique nature of the operation of the Hughes companies prior to Hughes' death has undoubtedly exacerbated this problem for Summa. Furthermore, the period covered by the allegations covers ten years ending in 1976, a lengthy period of time. We find that counterdefendants have been more than advised of the nature of the claim that they must answer, *see Walling*, 476 F.2d at 397, and that Rule 9(b), to the degree that it must be complied with, has been satisfied.

A dismissal on the pleadings with prejudice is a harsh remedy that "should only be invoked in extreme circumstances." *Industrial Building Materials, Inc. v. Interchemical Corp.*, 437 F.2d 1336, 1339 (9th Cir. 1970). Summa has sufficiently pleaded its claims and must be allowed to proceed. The dismissal under Rule 41(b) and Rule 12(b)(6) was improper. If, as counterdefendants suggest, this is a claim brought solely to smear their reputation, any such lightly made claims can be disposed of by summary judgment after discovery. We express no view on the merits of Summa's counterclaim.

Since, in light of our decision, there is no longer a final judgment to protect, the district court injunction enjoining Summa from pursuing any similar action, including the

Nevada state claim, must be reversed. *Woods Exploration & Producing Co. v. Aluminum Company of America*, 438 F.2d 1286, 1316 (5th Cir. 1971), *cert. den.*, 404 U.S. 1047 (1972). The stays pending this appeal that were ordered by this Court on July 30, 1980, and on July 31, 1980, in the actions *Gay v. Summa Corp.*, CV-79-02974-R, *Holmes v. Summa Corp.*, CV-79-02973-R, *Davis v. Summa Corp.*, CV-79-2375-R, and *Davis and Cox v. Summa Corp.*, CV-79-2374-R, are also vacated.

Reversed and remanded.

Chambers, Senior Circuit Judge

I concur in Judge Larson's Memorandum. He does not discuss the request that the case be remanded back to a different district trial judge. Impliedly the request is denied. I cannot bring myself to vote to order such a transfer, but the trial judge must be tired of this case. I am. I would hope he would pass it on to someone else.

APPENDIX B.

(1) Amended Answer of Defendant Summa Corporation; (2) Second Amended Counterclaims for Damages and Other Relief Against Fiduciaries; (3) Demand for Jury Trial.

United States District Court, Central District of California.

Davis & Cox, a partnership, Plaintiff, vs. Summa Corporation, a Delaware Corporation, Defendant.

Summa Corporation; Hughes Air Corp., d/b/a/ Hughes Airwest; and Hughes Properties, Inc., Counterclaimants, vs. Davis & Cox, a partnership, Maxwell E. Cox, Howard M. Jaffe, D. Martin Cook, Chester C. Davis, Frank William Gay, Levar Beebe Myler, John Morrison Holmes, Jr., Howard Lorenzo Eckersley, James H. Rickard, Wilbur Sutton Thain, M.D., and Norman Francis Crane, M.D., Counterdefendants. No. CV 79-02374-R.

Defendant and counterclaimant Summa Corporation alleges as follows:

[Answer omitted.]

COUNTERCLAIMS

Nature of the Counterclaims

25. These are counterclaims for damages, an accounting, declaratory and other relief brought against former employees and other fiduciaries of the late Howard Robard Hughes, Jr., and certain corporations owned by him.

Parties

(a) Counterclaimants

26. Defendant and Counterclaimant Summa Corporation ("Summa"), formerly known as Hughes Tool Company, is a Delaware corporation, which has had a principal place

of business in Las Vegas, Clark County, Nevada at all times since 1966. Its stock is wholly owned by the Estate of Howard Robard Hughes, Jr. (the "Hughes Estate"). It was known as Hughes Tool Company until December 12, 1972.

27. Counterclaimant Hughes Air Corp., d/b/a/ Hughes Airwest ("Airwest"), is a Delaware corporation duly qualified to do business in the State of Nevada and having its principal place of business in San Mateo, California. Its stock is 78 percent owned by Summa and 22 percent owned by the Hughes Estate. It was acquired by Summa on April 3, 1970.

28. Counterclaimant Hughes Properties, Inc., is a Nevada corporation having its principal place of business in Las Vegas, Clark County, Nevada. Its stock is wholly owned by the Hughes Estate. Hughes Properties, Inc., formerly known as Hughes Television Network, Inc., is a successor in interest to Hotel Properties, Inc., Harold's Club, Inc., Hughes Archisystems, Inc., Hughes Sports Network, Inc., and The Sands, Inc., the principal places of business of which were in Las Vegas, Nevada at all relevant times. Hughes Properties, Inc., Hughes Television Network, Inc., Hotel Properties, Inc., Harold's Club, Inc., and The Sands, Inc. owned hotels and casinos in Nevada at relevant times.

(b) Counterdefendants and Co-Conspirators

29. Counterdefendant Frank William Gay is a citizen of California and resides at 18005 Rancho Street, Encino, Los Angeles County, California. Gay was or acted as a director of Summa from February 15, 1962, until February 28, 1978, a member of Summa's Executive Committee from February 15, 1962, until February 28, 1978, a director of Hughes Properties or one or more of its predecessor corporations from December 5, 1970 until February 28, 1978, a member

of Hughes Properties' Executive Committee from June 25, 1971, until February 28, 1978, and a director of Airwest from February 12, 1970, until June 9, 1978. He was vice president of Summa from February 15, 1962 until July 16, 1962, senior vice president from July 16, 1962 until January 23, 1973, executive vice president from January 23, 1973 until August 3, 1976, and president from August 3, 1976 until February 28, 1978, vice president of Hughes Properties or one or more of its predecessor corporations from December 17, 1971 until February 28, 1978, and vice president-administration of Airwest from July 28, 1972 until November 17, 1977.

30. Counterdefendant Chester C. Davis is a citizen of New York and resides at 901 Lexington Avenue, New York, New York. He was counsel to Hughes from 1961 until Hughes' death, general counsel to Summa from 1961 until May 26, 1977, vice president of Summa from May 25, 1961 until July 31, 1961, secretary of Airwest from March 5, 1970 until April 23, 1971, vice president and counsel to Airwest from April 23, 1971 until November 17, 1977, and counsel to Hughes Properties and its predecessor corporations from approximately 1967 until May 26, 1977. He was or acted as a director of Summa from December 30, 1970 until May 26, 1977, a member of Summa's executive committee from January 23, 1973 until May 26, 1977, a director of Airwest from on or about April 2, 1970 until on or about November 17, 1977, a director of Hughes Properties or one or more of its predecessor corporations from December 5, 1970 until October 21, 1977, and a member of its executive committee from June 25, 1971 until October 21, 1977.

31. Nadine Henley Marshall is a citizen of California and resides at El Camino Towers, 1830 Avenida Del Mundo, Coronado, California 92118. At the time this action was commenced, she was domiciled in Las Vegas, Nevada.

She was or acted as a director of Summa from December 15, 1972 until April 25, 1979, a member of Summa's Executive Committee from January 23, 1973 until April 25, 1979, a director of Airwest from January 26, 1973 until June 8, 1978, and a director of Hughes Properties or one or more of its predecessor corporations from December 29, 1972 until April 25, 1979. She was vice president of Summa from December 6, 1972 until January 23, 1973, and senior vice president from January 23, 1973 until April 25, 1979. Nadine Henley Marshall is named as a co-conspirator, but not a counterdefendant in this action.

32. Counterdefendant Davis & Cox is a partnership engaged in the practice of law having places of business at One State Street Plaza, New York, New York, and at 1900 Avenue of the Stars, Los Angeles, California. After Davis' position as counsel to Summa was terminated on May 26, 1977, the firm continued acting as counsel until approximately September 1978, and was general counsel to Airwest from on or before April 1, 1970 until on or about June 16, 1978. At all relevant times, counterdefendant Chester C. Davis was a general partner of Davis & Cox. At all relevant times, counterdefendants Maxwell E. Cox, Howard M. Jaffe, and D. Martin Cook were general partners of Davis & Cox, and they are liable for the actions of Chester C. Davis and Davis & Cox.

33. Counterdefendant Maxwell E. Cox was assistant secretary of Airwest from July 28, 1972 until November 17, 1977.

34. Counterdefendant Howard M. Jaffe was secretary of Summa from December 29, 1972 until August 17, 1977, assistant secretary of Airwest from March 5, 1970 until January 26, 1973, secretary of Airwest from January 26,

1973 until November 17, 1977 and secretary of Hughes Properties and its predecessor corporations from December 29, 1972 until August 17, 1977.

35. Kay Gibbons Glenn is a citizen of Nevada and resides at 52 Country Club Lane, Las Vegas, Clark County, Nevada. He was managing director of corporate services for Summa from December 1973 until January 15, 1979, and a director of Airwest from January 26, 1973 until June 9, 1978. Kay Gibbons Glenn is named as a co-conspirator, but not a counterdefendant in this action.

36. Counterdefendant Howard Lorenzo Eckersley is a citizen of Utah and resides at 2219 Lauri Kay, Salt Lake City, Utah. At times relevant to the counterclaims, he was a personal aide to Hughes.

37. Counterdefendant James H. Rickard is a citizen of Utah and resides at 1157 South Lynwood Dr., Orem, Utah. At times relevant to the counterclaims, he was a personal aide to Hughes.

38. Counterdefendant Levar Beebe Myler is a citizen of Utah and resides at 1986 East Johnston Drive, Sandy, Utah. He was or acted as a director of Summa from December 15, 1972 until May 26, 1977, and a director of Hughes Properties or one or more of its predecessor corporations from December 29, 1972 until October 21, 1977. At times relevant to the counterclaims, he was a personal aide to Hughes.

39. Counterdefendant John Morrison Holmes, Jr., is a citizen of California and resides at 10342 Dunleer Drive, Los Angeles, California. He was or acted as a director of Summa from December 15, 1972 until May 26, 1977, and a director of Hughes Properties or one or more of its predecessor corporations from December 29, 1972 until October

21, 1977. At times relevant to the counterclaims, he was a personal aide to Hughes.

40. Counterdefendant Wilbur Sutton Thain, M.D., is a citizen of Utah and resides at 1856 North 1200 East, Logan, Utah. At various times relevant to the counterclaims, Thain was engaged as a personal physician to Hughes. At all relevant times, Thain was Gay's brother-in-law.

41. Counterdefendant Norman Francis Crane, M.D., is a citizen of California and resides at 2308 Coldwater Canyon Drive, Beverly Hills, California. At various times relevant to the counterclaims, Crane was engaged as a personal physician to Hughes.

42. Clarence Albert Waldron is a citizen of Nevada and resides at 3225 South Torrey Pines, Las Vegas, Nevada. At times relevant to the counterclaims, he was a personal aid to Hughes. Clarence Albert Waldron is named as a co-conspirator, but not a counterdefendant in this action.

43. Homer Hone Clark, M.D., is a citizen of Utah and resides at 2123 Park Way, Salt Lake City, Utah. At various times relevant to the counterclaims, Clark was engaged as a personal physician to Hughes. Clark is the brother of Rand H. Clark, who was Gay's executive assistant from August 25, 1952 until January 31, 1978. Homer Hone Clark is named as a co-conspirator, but not a counterdefendant in this action.

44. At all times relevant hereto, each of the named counterdefendants and their co-conspirators owed fiduciary duties to Hughes, Summa, Airwest, and Hughes Properties and its predecessor corporations by virtue, *inter alia*, of their positions as attorneys, physicians, corporate directors and officers, and aides having close relationships of trust and confidence with Hughes.

Limitations

45. No applicable statute of limitations, if any exists, bars these counterclaims because the wrongs complained of constitute parts of a continuous wrongful scheme and because the statute was tolled, and counterdefendants in any event are estopped to assert it, because during the period referred to herein:

(a) Counterdefendants and their co-conspirators dominated and controlled the affairs of Summa and Hughes Properties, and its predecessor corporations, from at least as early as November 1970 until February 28, 1978, and of Airwest from at least as early as December 1972. Counterdefendants and their co-conspirators did so through their position as directors and officers of Summa, Airwest and Hughes Properties and its predecessor corporations and through powers allegedly given to them by Hughes, including the following:

(1) From November 1970, and before, one or more counterdefendants and co-conspirators held positions as a director, officer or counsel to Summa. In December 1972, Gay and Davis, acting through Rickard and George Francom, obtained a proxy, which purported to be executed by Hughes, purportedly giving Gay and Davis power to exercise all of Hughes' rights as the sole stockholder of Summa, other than the power to sell or transfer. From December 1972, counterdefendants and their co-conspirators held all positions on the board of directors of Summa. All counterdefendants and all co-conspirators were members of the conspiracy alleged below.

(2) From November 1970, and before, one or more counterdefendants and co-conspirators held positions as a director, officer or counsel to Airwest. Through such positions, through their control of Summa, of which Airwest is a

subsidiary, and through the complete control over Airwest which Gay and Davis purportedly were authorized to exercise through the alleged December 1972 proxy, counterdefendants and their co-conspirators dominated and controlled the affairs of Airwest.

(3) From November 1970, and before, one or more counterdefendants and co-conspirators held positions as a director or counsel to Hughes Properties or its predecessor corporations. In November 1970, Gay and Davis, acting through Eckersley and Myler, obtained a proxy, which purported to be executed by Hughes, purportedly giving a majority of Gay, Davis, and Raymond M. Holliday, complete control over his Nevada property and predecessor corporations to Hughes Properties, other than the power to sell or transfer or change their names. From December 1972, counterdefendants and their co-conspirators held a majority or substantial number of the positions on the board of directors of Hughes Properties or its predecessor corporations.

During the periods of adverse domination, counterdefendants and their co-conspirators were in full, complete and exclusive control of the affairs and finances of Summa, Airwest and Hughes Properties. No independent person authorized to act on behalf of Summa, Airwest or Hughes Properties or its predecessor corporations could discover, or did discover, during this period any of the wrongs hereinafter alleged. On information and belief, throughout this period of adverse domination, Hughes, the sole stockholder of Summa and Hughes Properties, also was unable to discover, and did not discover, any of the wrongs hereinafter alleged or, if he was aware of and acquiesced in counterdefendants' actions, his acquiescence was invalid because he was mentally incompetent or because it was procured through undue influence or other improper means, many of

the details of which remain in the sole possession of the counterdefendants and their co-conspirators.

(b) Notwithstanding their fiduciary capacity, counterdefendants and their co-conspirators at no time prior to the institution of this action disclosed to Hughes, or an independent person authorized to act on his behalf or on behalf of his Estate, or to a disinterested board of directors of any of the counterclaimants, the fact, nature, or extent of the wrongs they had engaged in.

(c) Counterdefendants and their co-conspirators engaged in conduct designed to, and having the effect of, concealing the fact of their wrongdoing, hereinafter alleged, from anyone who could take action on behalf of counterclaimants, including the following:

(1) All counterdefendants and their co-conspirators concealed at various times, from at least as early as November 1970 until the present, Hughes' physical and mental condition and disabilities, his inability to direct his businesses, and that he no longer directed his businesses, from the public at large.

(2) On January 23, 1971, Gay and Davis held a series of briefings on the firing of Robert Maheu with members of the news media. During those briefings, Gay and Davis each stated that Hughes was in good health, or in good condition mentally and physically, or extremely sharp or keen mentally and that nothing was wrong with him physically, when in truth and in fact Hughes at the time was habituated to or dependent on drugs and suffered from severe physical and mental disabilities.

(3) Counterdefendants and their co-conspirators affirmatively misrepresented Hughes' physical and mental condition and ability to control his businesses in proceedings

before courts and governmental agencies having legitimate interests in the information, including:

(i) On October 10 and 11, 1978, Davis testified in *In re Consolidated Pretrial Proceedings in Airwest Securities Litigation* (United States District Court for the Northern District of California) that Hughes in 1975 was "unquestionably" lucid, that Davis had no reason to believe that Hughes was incompetent at any time, and that Hughes was "extremely competent," when in truth and in fact Hughes at all times since 1970 was habituated to or dependent on drugs and suffered from severe physical and mental disabilities and was mentally incompetent from at least August 1973.

(ii) On December 9, 1970, Clark executed an affidavit in Nassau, Bahamas, in which he stated that he could "certify that he [Hughes] is in good health and spirits", when in truth and in fact Hughes at the time was habituated to or dependent on drugs and suffered from severe physical and mental disabilities.

(4) In 1976, following Hughes' death on April 5, 1976 and 1977, Hughes' aides and physicians were interviewed by representatives of Summa and others. Aides, including Rickard, Waldron, Holmes, Myler and Eckersley, and Crane, Thain and Clark represented that Hughes in April 1976 was in possession of his faculties and lucid, and Holmes, Myler and Thain represented that Hughes was not mentally incapacitated in the period before April 1976, when in truth and in fact Hughes was mentally incompetent from at least August 1973, and was habituated to or dependent on drugs.

(5) On or about April 5, 1976, the day of Hughes' death, Thain destroyed documents in Acapulco, Mexico, which on information and belief belonged to Hughes and corporate

counterclaimants and contained information which would have contributed to the discovery and proof of the counterclaims alleged herein. Thereafter, Thain examined the dying Hughes. On or about the same date, and immediately following Hughes' death, Waldron, Clyde Crow and Eric Bundy (other personal aides of Hughes), pursuant to Glenn's directions, also destroyed such documents in Acapulco, Mexico. Other aides, including Eric Bundy, destroyed other such documents prior to moving Hughes from one location to another.

(6) Thain and Norman Crane issued prescriptions for drugs for Hughes in false names, including prescriptions in the names of Holmes and other aides. Thain and aides, including principally Holmes, had such false prescriptions filled.

(7) On or about October 15, 1974, Waldron issued a message that Hughes had approved the hiring of Dr. James Fletcher, when in truth and in fact Hughes had not granted such approval. The effect of Waldron's communication purportedly on behalf of Hughes was to create the appearance that Hughes was in control of his businesses, when in truth and in fact he was not.

On information and belief, these and other counterdefendants and co-conspirators have engaged in the same or similar acts of concealment, the facts of which are still under investigation or are in the sole possession of the counterdefendants and their co-conspirators. Counterclaimants were not aware of, and could not have discovered with reasonable diligence, the wrongs alleged herein, because of these acts of concealment, and the actions and conditions referred to in paragraphs 45(a) and (b).

(d) Counterdefendants and their co-conspirators participated in a conspiracy to injure counterclaimants, the last

overt act in furtherance of which was completed no earlier than August 16, 1979.

46. The wrongs alleged herein were not, and could not have been, discovered until mid-1978, after counterdefendants and their co-conspirators had been removed from their positions of control over the records and affairs of Hughes and counterclaimants were first able to obtain sufficient information indicative of the wrongs committed by counterdefendants and their co-conspirators on which the counterclaims asserted herein are based. In April 1978, in one of the first interviews conducted by the Estate's counsel outside the presence of counterdefendants or their co-conspirators, Dr. Lawrence Chaffin, a former physician to Hughes, revealed that he once was asked to remove a broken-off hypodermic needle from Hughes' arm. The same month, counterclaimants first obtained access to x-rays taken at the time of Hughes' autopsy, which showed what appear to be a number of broken-off hypodermic needles in Hughes' arms (and which were not mentioned in the written autopsy report). Thereafter, reliable information concerning Hughes' use of drugs and physical and mental condition began to be received. In May 1978, an expert was hired to review and analyze the information and in June 1978, counterclaimants obtained a reliable scientific opinion that Hughes, from at least August 1973 until his death, suffered from severe physical disabilities, was mentally incompetent and was incapable of making informed or rational business judgments. This information concerning Hughes' physical and mental condition, when contrasted with counterdefendants' and co-conspirators' repeated representations as to Hughes' good health and competency, prompted counterclaimants to begin a full investigation of Hughes' condition and business affairs. That investigation is not yet completed. Since counterdefendants and their co-conspirators have remained

in exclusive control of much relevant information relating to Hughes and the counterclaimants, discovery of many facts will only be possible during discovery proceedings. In addition, other facts have been inaccessible to counterclaimants to date due to the failure and refusal of Gay, Glenn, Henley Marshall, Davis and Davis & Cox and, on information and belief, one or more other counterdefendants or co-conspirators, to return relevant documents belonging to counterclaimants.

Background.

47. On or about November 27, 1966, Hughes arrived in Las Vegas, Nevada. Within the following weeks, he changed his enterprises' operational structure, centering control in Nevada.

48. From that time until on or about November 25, 1970, Hughes remained secluded in quarters located in the Desert Inn in Las Vegas, Nevada, where he was attended by aides, including Eckersley, Holmes and Myler, and treated by physicians, including Crane. During this period, and throughout the balance of his life, Hughes was habituated to or dependent on drugs, suffered from severe physical and mental disabilities and had an irrational fear of contamination by germs and other contacts with the outside world.

49. The aides in Nevada, including Eckersley, Holmes and Myler, processed all paperwork and written communications to and from Hughes and screened virtually all his telephone calls and other messages. Access to Hughes was virtually impossible, except through the aides. This continued throughout the remainder of Hughes' life.

50. In early 1970 and for some time previously, Robert Maheu was head of Hughes' Nevada operations, and Chester Davis was in overall charge of the defense of Summa and Hughes in a major antitrust case, *Trans World Airlines, Inc.*

v. Hughes Tool Co., and related litigation. In 1969 and 1970, the United States District Court for the Southern District of New York entered judgment against Hughes and Summa for more than $145 million in that case.

51. In late 1970, Maheu purportedly obtained complete authority for the defense of the TWA litigation from Hughes and, in the period November 6-12, 1970, fired Davis as counsel and directed that Davis' name not appear on future briefs in the case. From 1961 through 1970, Davis and Davis & Cox had collected millions of dollars from Summa, largely for their services and expenses in the TWA litigation.

52. On November 14, 1970, Davis and Gay, acting through Eckersley and Myler, obtained in Las Vegas, Nevada, a proxy, purportedly signed by Hughes. The proxy purported to give Davis, Gay and Raymond Holliday, or a majority of them, complete power over Hughes' Nevada operations, except the power to sell or transfer.

53. On information and belief, on or about December 3, 1970, Davis and Gay caused Maheu to be fired, thus removing the only remaining executive in the Hughes organization who was able to exert any independent control or opposition to them. Immediately thereafter, Gay, Davis and other counterdefendants and co-conspirators traveled to Las Vegas, Nevada to, and did, effectuate the transfer of control of the Nevada operations to themselves.

54. From and after November 25, 1970, Hughes was in exile from Nevada and the United States which lasted until his death. On information and belief, counterdefendants and their co-conspirators exercised influence or control over Hughes' physical location because he was physically and/or mentally incapacitated or because his movements were induced by undue influence or other improper means. Hughes' remaining years were spent in the Bahamas, Nic-

aragua, Canada, England and Mexico. His physical and mental condition continued to deteriorate and his isolation from all but his aides, including Waldron and Rickard in addition to Eckersley, Holmes and Myler, and physicians became virtually complete.

55. Hughes died on or about April 5, 1976 on an airplane while en route from Acapulco, Mexico, to Houston, Texas.

FIRST COUNTERCLAIM ON BEHALF OF SUMMA AND HUGHES PROPERTIES AGAINST ALL COUNTERDEFENDANTS.

56. Counterclaimants repeat and reallege each of the allegations contained in paragraphs 25 through 55.

57. On information and belief, commencing between Hughes' arrival in Nevada and some time in 1970, Davis, Gay and Henley Marshall, in breach of their fiduciary duties, implied contractual duties of fairness and good faith and other duties to Hughes, Summa, Hughes Properties and its predecessor corporations, conspired among themselves to, and did, gain control of Hughes' personal and corporate assets, including Summa, and Hughes Properties and their assets, for their personal benefit and misappropriated such assets to their own use or to the use of others. Each of the other counterdefendants and co-conspirators was or became a party to the conspiracy with the object of furthering his personal financial interests at the expense of counterclaimants. In furtherance of the conspiracy, the counterdefendants and their co-conspirators have engaged in the overt acts described below, among others:

(a) Aides, including each of those named as counterdefendants herein, limited and controlled the flow of information and access to Hughes, in the State of Nevada and elsewhere. Gay, Henley Marshall and Glenn controlled the selection and continued employment of the aides, their

salaries and benefits. The aides regularly met with Gay, Henley Marshall, and/or Glenn before and after periods of assignment to Hughes. On information and belief, the aides reported to and were directed by Gay, Henley Marshall and Glenn.

(b) Crane and Thain supplied Hughes with drugs and prescriptions for drugs, which were filled in many cases by Thain and Hughes' aides, including principally Holmes. Crane supplied Hughes with drugs and drug prescriptions in the State of Nevada, the Bahamas and elsewhere, and Thain supplied Hughes with drugs and drug prescriptions in the Bahamas, Mexico and elsewhere. Gay, Henley Marshall and Glenn controlled the selection and/or continued employment of Crane, Thain and Clark, their salaries and benefits. Thain, Crain and Clark regularly met with one or more of them before and after periods of assignment to Hughes. On information and belief, Crane, Thain and Clark reported to and were directed by Gay, Henley Marshall and Glenn.

(c) Thain secured a medical license in the State of Nevada. Clark requested blood samples from Hughes in the State of Nevada and rendered medical opinions and advice to be acted upon in Nevada while Hughes was there.

(d) Each of the counterdefendants and their co-conspirators concealed Hughes' physical and mental condition while in the State of Nevada and elsewhere, from the public at large and Davis and Clark concealed Hughes' condition from courts having legitimate interests in such information, as referred to in paragraph 45(c)(3) above.

(e) Gay obtained a Nevada gaming license during the period 1966-1970.

(f) On or about November 14, 1970, Gay and Davis, acting through Eckersley and Myler, obtained a proxy,

which purported to be executed by Hughes in the State of Nevada. The proxy was drafted by Davis & Cox and transmitted by them to Nevada. On information and belief, the purported Hughes' signature was then obtained by undue influence or other improper means. The proxy purported to appoint a majority of Gay, Davis and Raymond M. Holliday (a Hughes Tool Co. executive) as Hughes' attorneys in his name to exercise all of his rights over his Nevada property and predecessor corporations to Hughes Properties, except the power to sell or transfer.

(g) On information and belief, Eckersley, Holmes and Myler removed Hughes from, or induced him by undue influence or other improper means to leave the State of Nevada on or about November 25, 1970.

(h) On information and belief, on or about September 16, 1972, Gay and Davis, or other defendants or co-conspirators, obtained a power of attorney, which purported to be executed by Hughes and which purported to empower one or more of them to exercise certain rights and powers of Hughes as Summa's sole stockholder or over other Hughes' properties. Plaintiffs' belief is based upon the provision of the December 12, 1972 proxy, referred to below in subparagraph (i), that its provisions "are not intended to render, null or void the powers granted in prior appointment of power of attorney dated September 16, 1972."

(i) On December 12, 1972, Gay and Davis, acting through Clarence Waldron and George Francom, two of Hughes' personal aides, obtained a proxy, which purported to be executed by Hughes. On information and belief, the purported Hughes' signature was obtained by undue influence or other improper means. The proxy purported to appoint Gay and Davis, acting jointly, as Hughes' attorneys in his name to exercise all of his rights as Summa's sole stockholder, other than the right to sell or transfer. The

proxy purported specifically to authorize the election of Gay, Davis, Henley Marshall, Myler and Holmes as Summa's directors.

(j) On December 14, 1972, Gay and Davis obtained the resignations of nine other directors on the Summa board of directors. The following day, Gay and Davis elected Henley Marshall, Myler and Holmes to fill the newly created vacancies on the board.

(k) On or about December 22, 1972, Gay and Davis, acting through Rickard and George Francom, another Hughes personal aide, obtained a proxy, which purported to be executed by Hughes. On information and belief, the purported Hughes' signature was obtained by undue influence or other improper means. The proxy purported to appoint Gay and Davis as Hughes' attorneys-in-fact to exercise all his rights and powers as Summa's sole stockholder, other than the power to sell or transfer. The proxy purported specifically to authorize the election of Gay, Davis, Henley Marshall, Myler and Holmes as Summa's directors.

(l) On December 29, 1972, Henley Marshall, Myler and Holmes were appointed Summa directors by stockholder action, through the alleged proxy. Board of Directors meetings thereafter were conducted in the state of Nevada and elsewhere.

(m) On or about January 23, 1973, Davis and Henley Marshall were elected as members of Summa's Executive Committee by the Summa directors to fill the vacancies created by the resignations of all former members of the Executive Committee other than Gay.

(n) Gay, Davis, Henley Marshall, Myler and Holmes on or before September 27, 1973 travelled to the State of Nevada to appear before the Nevada Gaming Control Board, and on September 28, 1973, before the Clark County Com-

mission, both in Las Vegas, Nevada, in order to obtain, or renew Nevada gaming licenses and obtained such licenses.

On information and belief, each of the above acts, whether or not wrongful in and of itself, was in furtherance of the wrongful purpose of the conspiracy to gain control of Hughes' personal and corporate assets for the counterdefendants and their co-conspirators' personal benefit, as each act enabled the counterdefendants or their co-conspirators, among other things, to prevent discovery of Hughes' physical and mental condition and their own wrongdoing or to assert and exercise authority and control over Hughes' personal and corporate assets, all for the alleged wrongful purpose.

Counterclaimants' belief as to those matters alleged on information and belief is based on the facts alleged throughout this pleading, including the matters alleged in paragraphs 45, 46 through 55, 57, 58, 63, 64, and 76 through 83 hereof, and in Defendant Summa Corporation's Answers to Counterdefendants' Frank William Gay and John Morrison Holmes Jr. First Set of Interrogatories, dated October 26, 1979, filed in this action, which are incorporated by reference herein. Further facts concerning the formation of the conspiracy are in the exclusive control of the counterdefendants and their co-conspirators; their discovery will only be possible during discovery proceedings.

58. Counterdefendants acted pursuant to the conspiracy to benefit themselves, their families and friends, to the detriment of counterclaimants, by misappropriating to their own use or the use of others Hughes' personal and corporate assets. Counterclaimants were injured by their acts in the following among other ways:

(a) Summa entered into employment and/or consulting agreements with Gay, Henley Marshall, Myler, Holmes,

Eckersley, Rickard, Glenn, Waldron, Thain, and Crane which provided them with exhorbitant and unreasonable salaries and fees, far exceeding the value of any services performed by them. Said contracts were approved or acquiesced in by Summa's directors, Gay, Davis, Henley Marshall, Myler and Holmes, each of whom was interested in the transactions and each of whom acted to further his own financial interest.

(b) On information and belief, each of the counterdefendants made personal use of the corporate assets of Summa, including corporate aircraft, automobiles and/or accommodations, and/or of the services of corporate employees, without reimbursing the corporation therefor.

(c) On numerous occasions, counterdefendants charged personal expenses to Summa, including without limitation, the following:

(1) Gay, Eckersley, Myler, and Glenn charged Summa, or other Hughes' businesses, more than $130,000 for the support and education of their children, relatives and friends, by causing them to pay salaries to such persons while full-time students or to make direct payments for expenses or tuition, as listed on Exhibit A attached hereto, without receiving any services or consideration in return.

(2) Gay, caused Summa and Hughes Properties to expend more than $150,000 in contributions in 1976-1977 to Harvard, and Westlake School for Girls. On information and belief,, such contributions were made to insure the admission and continued attendance at such schools of his children.

(3) Gay and Henley Marshall charged Summa with substantial sums for improvements to their homes.

(4) Gay charged Summa approximately $75,000 for rental of an office in his home.

(5) On information and belief, each of the counterdefendants charged Summa with substantial sums for personal travel expenses of themselves, their families and friends.

(6) Davis charged Summa with substantial sums for expenses with no business purpose, including more than $100,000 for the improvement and operation of a farm owned by Davis's wife and more than $29,000 for the purchase of two Mercedes Benz in the name of F. Manheim. Attached hereto as Exhibit B is a list prepared by Deloitte, Haskins & Sells, based solely upon a partial spot audit, of charges by Davis to his Summa expense account for $5000 or more, other than for payroll and rent expenses, for under $5000 made in a selected month of each year and for salaries of certain personnel employed by Davis which have no business purpose or no apparent business purpose. Based solely on this limited spot audit, in the period 1962 through 1976, such charges totalled more than $645,000.

(7) Thain, after Hughes' death, charged Summa with substantial sums for expenses with no legitimate business purpose.

(d) Gay, Eckersley, Myler and Thain obtained substantial loans for themselves or others from Summa, which have not been repaid in full. The outstanding principal balances as of April 30, 1979 were as follows:

(1) Gay — $213,143.09;

(2) Daniele Keyhan — $16,711.85;

(3) Eckersley — $1,823.47;

(4) Myler — $4,592.38; and

(5) Thain — $5,000.

(e) Gay during the period 1973-1976, maintained and repeatedly made substantial improvements to offices in Encino, California at Summa's expense, despite Hughes' earlier directions to move the offices to Las Vegas, Nevada,

to suit Gay's personal convenience and wishes, and without any legitimate business justifications therefor.

(f) Davis and Davis & Cox during the period 1971-1976 established and made substantial improvements to their offices in Los Angeles, California and New York, New York at Summa's expense and, on information and belief, without any contractual basis or legitimate business justification therefor.

(g) Gay, Cook and Davis & Cox caused Summa in 1973 to abandon a debt of approximately $130,000 owed to it by Paul Jordan, by knowingly permitting the statute of limitations to expire on Summa's claim without serving Jordan, in an effort to deter Jordan from suing Gay on a personal debt of $14,000.

(h) Gay during the period 1971-1976 caused Summa to pay Mario Zamparelli, a friend of Gay's, unreasonable and excessive amounts to design the Summa Letterhead, logo, handblown glass tumblers for use on the Summa aircraft and for similar tasks.

(i) Davis during the period 1972-74 caused Summa to make payments to Frank Manheim, a friend of Davis, allegedly for writing a biography of Hughes, which has never been published or, on information and belief, written.

(j) Gay, Glenn, Henley Marshall, Davis and Davis & Cox obtained possession of corporate property, documents or records, which they have failed and refused to return.

On information and belief, other and further instances of misuse of counterclaimants' funds by counterdefendants to enrich themselves, their friends and families at the expense of counterclaimants will be discovered as counterclaimants continue the investigation in which they are engaged and as information and documents still in the sole possession

of counterdefendants and others become accessible through discovery.

59. The actions and omissions of the counterdefendants injured Hughes, Summa and Hughes Properties in Nevada and elsewhere.

60. The aforesaid actions were committed by counterdefendants willfully, intentionally and maliciously.

61. Each of the counterclaimants has been damaged as a result of the foregoing in an amount, exceeding ten thousand dollars, which has not yet been fully determined.

SECOND COUNTERCLAIM ON BEHALF OF SUMMA AGAINST COUNTERDEFENDANTS GAY, HENLEY MARSHALL, MYLER AND HOLMES

62. Summa repeats and realleges each of the allegations contained in paragraphs 25, 26, 29, 31, 38, 39, and 44-46.

63. In or about 1974 and 1975, Gay, Henley Marshall, Myler and Holmes entered into employment and/or consulting contracts with Summa. The contracts provide that they are governed by the law of the State of Nevada.

64. At the time said contracts were entered into, Gay, Henley Marshall, Myler and Holmes were four of the five members of the board of directors of Summa and participated in the approval of said contracts.

65. The approval of the contracts, which were not fair to Summa, was in breach of the fiduciary duties of Gay, Henley Marshall, Myler and Holmes to Summa and Hughes.

66. Said contracts are void and voidable at the option of Summa.

THIRD COUNTERCLAIM ON BEHALF OF SUMMA AGAINST COUNTERDEFENDANTS GAY, HENLEY MARSHALL, ECKERSLEY, RICKARD, MYLER, HOLMES, THAIN AND CRANE

67. Summa repeats and realleges each of the allegations contained in paragraphs 25, 26, 29, 31, 35-41, 44-46, 48, 49, 57-59 and 63.

68. Eckersley, Rickard, Glenn, Waldron and Thain in or about 1974 and 1975 and Crane in or about 1976 entered into employment and/or consulting contracts with Summa, in which they were interested. The contracts provide that they are governed by the law of the State of Nevada.

69. The contracts between Summa and Gay, Henley Marshall, Myler, Holmes, Eckersley, Rickard, Glenn, Waldron, Crane and Thain, which were not fair to Summa, were entered into and approved pursuant to the conspiracy, in breach of the fiduciary duties of each of them to Summa and Hughes.

70. Said contracts are void and voidable at the option of Summa.

FOURTH COUNTERCLAIM ON BEHALF OF SUMMA AND HUGHES PROPERTIES AGAINST COUNTERDEFENDANTS GAY, DAVIS, HENLEY MARSHALL, MYLER and HOLMES

71. Summa repeats and realleges the allegations contained in paragraphs 25, 26, 28, 29, 30, 31, 38, 39, and 45-46.

72. During the period 1971-76, Gay and Davis engaged in the following actions and omissions:

(a) Gay caused Summa to construct a multi-million dollar addition to the Desert Inn Hotel, Las Vegas, Nevada, on leased land, contrary to Hughes' instructions to use the adjacent land, which Hughes owned in fee, and the counterdefendants failed to supervise and mismanaged the construction of the addition, resulting in additional costs to Summa of millions of dollars.

(b) Gay caused Summa and Hughes Properties and its predecessor corporations to employ as executives and employees persons lacking proper experience and qualifications, and Gay, Davis, Henley Marshall, Myler and Holmes

failed adequately to supervise such persons in the operations of the Nevada casinos and hotels.

(c) Davis caused Summa to purchase the Xanadu Princess Hotel, the Bahamas, in 1974 for an unreasonable and excessive price.

(d) Gay caused Summa to engage in projects with no legitimate business justifications, in 1973-1975 through Archisystems, a division of Summa, and in 1975-1977 through creation of "Football Today", a purported syndicated newspaper feature, causing loss to Summa.

(e) Gay and Davis caused Summa to lose a valuable corporate opportunity to purchase Texas International Airlines in late 1971.

On information and belief, Henley Marshall, Myler and Holmes, engaged or acquiesced in these and other and further acts of mismanagement, and Gay, Davis, Henley Marshall, Myler and Holmes engaged or acquiesced in other and further acts of mismanagement which will be discovered as counterclaimants continue the investigation in which they are engaged and as information and documents still in the sole possession of counterdefendants become accessible through discovery.

73. Acting as directors of Summa and Hughes Properties and its predecessor corporations, Gay, Davis, Henley Marshall, Myler and Holmes owed fiduciary duties to them, and their sole stockholder, Hughes. These counterdefendants' actions and omissions including their approval of or acquiescence in the employment contracts described in the Second and Third Counterclaims, were in breach of these duties and constitued waste, gross abuse of discretion, reckless disregard for the interests of the corporations and their stockholder, and negligence. These counterdefendants' actions and omissions were in furtherance or consequences

of the conspiracy. Whether part of the conspiracy or taken independently, however, they constitute independent breaches of counterdefendants' fiduciary duties.

74. As a result of their breaches of duty, Summa and Hughes Properties have been injured in an amount, exceeding ten thousand dollars, which has not yet been fully determined.

FIFTH COUNTERCLAIM ON BEHALF OF SUMMA AND AIRWEST AGAINST COUNTERDEFENDANTS DAVIS, DAVIS & COX, COX, JAFFE AND COOK

75. Summa and Airwest repeat and reallege the allegations contained in paragraphs 25, 26, 27, 30, 32, 33, 34, 44-48, 50, 51 and 57-59.

76. Davis and Davis & Cox improperly charged personal expenses and other excessive or improper costs to Summa while acting as Hughes' personal counsel and counsel to counterclaimants, including as referred to in paragraph 58(c)(6). As counsel, Davis, Davis & Cox, Cox, Jaffe and Cook improperly and incompletely reported to and advised their clients, in the State of Nevada and elsewhere.

77. In connection with the acquisition by Summa and Hughes of Airwest, Davis and others engaged in conduct, substantially in the State of Nevada, which led to the indictment in the State of Nevada, later dismissed, of Davis, Hughes and Summa for violation of the federal securities laws and wire fraud statute and to the institution of an action for an injunction and other relief by the Securities and Exchange Commission and civil damage litigation against them and Airwest.

78. Davis and Davis & Cox represented Summa and Airwest in the civil litigation. Based on its conclusion that Hughes' failure to appear for a deposition in said litigation

was willful and knowing, the court entered default judgments against Summa and Airwest in the amount of approximately $87 million, including interest. Following entry of the default judgment, the case was settled for approximately $37 million.

79. Hughes was mentally and physically unable to appear for a deposition in the Airwest litigation. Davis knew or should have known of Hughes' condition, but failed to disclose it to the court, even after Hughes' death, as disclosure of Hughes' condition would have jeopardized the control and influence exerted by Davis over Hughes, Airwest, Summa and the assets of each of them. Nor, on information and belief, did Davis advise, or cause to be advised, Hughes that he was ordered to appear for his deposition or of the consequences of a failure to appear at the deposition.

80. The default judgments were entered and the settlement necessitated as a proximate consequence of Davis' actions and omissions.

81. In *Trans World Airlines, Inc. v. Hughes Tool Co., et al.*, a case pending in the Delaware Court of Chancery, Davis appeared as counsel for Summa and Hughes. In that action, he filed an answer on behalf of Summa which controverted material factual allegations of the complaint. Subsequently, in 1975, after Hughes deposition had been noticed by the plaintiff, Davis caused an answer to be filed on behalf of Hughes, and ultimately obtained leave to file an amended answer on behalf of Summa, both of which admitted the well-pleaded factual allegations of the complaint. Subsequent to the filing of such answers, and as a proximate result thereof, the court granted plaintiff's motion for partial summary judgment.

82. Hughes was mentally and physically unable to appear for a deposition in the *TWA* case. Davis knew or should

have known of Hughes' condition, but filed the amended answer on behalf of Summa and the answer on behalf of Hughes in an effort to make Hughes' deposition unnecessary and to avoid either producing Hughes for a deposition or the imposition of sanctions for Hughes' failure to appear, as disclosure of Hughes' condition would have jeopardized the control and influence exerted by Davis over Hughes, Airwest, Summa and the assets of each of them.

83. The actions and omissions referred to in paragraphs 79, 81 and 82 were taken in furtherance of the conspiracy. Whether taken in furtherance of the conspiracy or independently, however, all of the actions and ommission alleged in this Fifth Counterclaim constituted breaches of the fiduciary duties of Davis and Davis & Cox to Summa, Airwest and Hughes; represented a failure by Davis and Davis & Cox to exercise that degree of care, skill and loyalty whch is required of attorneys in such circumstances; and constituted substantial and material breaches of the implied term and condition of Davis' and Davis & Cox's retainer by Summa and Airwest that Davis and Davis & Cox would act fairly and in good faith toward Summa and Airwest.

84. Summa and Airwest have been damaged as a result of the foregoing in an amount, exceeding ten thousand dollars, which has not yet been fully determined.

WHEREFORE, counterclaimants demand judgment as follows:

On The First Counterclaim:

1. Awarding to Summa and Hughes Properties and against counterdefendants, jointly and severally, such damages as each counterclaimant has sustained.

2. Declaring that each of the employment and/or consulting contracts between Summa and Gay, Henley Marshall, Myler, Holmes, Eckersley, Rickard, Crane and Thain

is void, requiring said counterdefendants to account for all sums paid to them pursuant to said contracts, and requiring all counterdefendants, jointly and severally, to repay Summa all such sums.

3. Requiring each of the counterdefendants to account to Summa and Hughes Properties for all property received by him from each of the counterclaimants, including without limitation all fees, salaries, loans and expenses, and requiring all counterdefendants, jointly and severally, to repay or return to such counterclaimants all property improperly obtained by counterdefendants.

4. Declaring that each of the counterdefendants holds all property received by him from Summa and Hughes Properties, or any of them as constructive trustee and requiring each of them to account for and return to such counterclaimants all such property and the proceeds thereof.

5. Awarding to Summa and Hughes Properties and against counterdefendants, jointly and severally, punitive damages in an amount not less that $50,000,000.

On The Second Counterclaim:

1. Declaring that each of the employment and/or consulting contracts between Summa and Gay, Henley Marshall, Myler and Holmes is void and requiring said counterdefendants to account for and, jointly and severally, to repay to Summa all sums paid to said counterdefendants pursuant to said contracts.

2. Awarding to Summa and against counterdefendants Gay, Henley Marshall, Myler and Holmes, jointly and severally, punitive damages in an amount not less than $50,000,000.

On The Third Counterclaim:

1. Declaring that each of the employment and/or consulting contracts between Summa and Gay, Henley Marshall, Myler, Holmes, Eckersley, Rickard, Crane and Thain is void and requiring said counterdefendants to account for and, jointly and severally, to pay over to Summa all sums paid to said counterdefendants pursuant to said contracts.

2. Awarding to Summa and against counterdefendants Gay, Henley Marshall, Myler, Holmes, Eckersley, Rickard, Crane and Thain, jointly and severally, punitive damages in an amount not less than $50,000,000.

On The Fourth Counterclaim:

1. Awarding to Summa and Hughes Properties and against counterdefendants Gay, Davis, Henley Marshall, Myler and Holmes, jointly and severally, such damages as Summa has sustained.

2. Awarding to Summa and Hughes Properties against counterdefendants Gay, Davis, Henley Marshall, Myler and Holmes, jointly and severally, punitive damages in an amount not less than $50,000,000.

On The Fifth Counterclaim:

1. Awarding to Summa and Airwest and against each counterdefendant, jointly and severally, such damages as Summa has sustained.

2. Requiring Davis and Davis & Cox to account for all sums received by them from Summa and Airwest and requiring counterdefendants, jointly and severally, to repay to Summa and Airwest all sums improperly received by Davis & Cox.

3. Declaring that Davis, Davis & Cox, Cox, Jaffe and Cook hold all property improperly received by them from Summa and Airwest as constructive trustees and requiring

each of them to account for and return to Summa and Airwest all such property and the proceeds thereof.

4. Awarding to Summa and Airwest and against counterdefendants, jointly and severally, punitive damages in an amount not less than $50,000,000.

On The Complaint And On Counterclaims:

Awarding to defendants and counterclaimants and against plaintiff and counterdefendants, jointly and severally,

1. The dismissal of the Complaint with prejudice;

2. The costs and disbursements of this action and these counterclaims, and

3. Such other and further relief as is just and proper.

DEMAND FOR JURY TRIAL

Defendant and counterclaimant Summa Corporation demands a jury trial with respect to the original action and the foregoing counterclaims.

Dated: February 21, 1980.

KINDEL & ANDERSON
MALCOLM GEORGE SMITH
CARLOS SOLIS
GEORGE L. O'CONNELL
By /s/ Malcom George Smith
MALCOLM GEORGE SMITH

Attorneys for Defendant and Counterclaimant, SUMMA CORPORATION and Additional Counterclaimants HUGHES PROPERTIES, INC. and HUGHES AIR CORP., 555 South Flower Street, Los Angeles, California 90071, (213) 680-2222.

APPENDIX C.

[Excerpts From:] Defendant and Counterclaimant Summa Corporation's Answers to Counterdefendants Frank William Gay and John Morrison Holmes, Jr. First Set of Interrogatories.

[Incorporated By Reference Into The Second Amended Counterclaims].

United States District Court Central District of California.

Davis & Cox, a partnership, Plaintiff, v. Summa Corporation, a Delaware corporation, Defendant.

Summa Corporation, Counterclaimant, v. Davis & Cox, a partnership, Maxwell E. Cox, Howard M. Jaffe, D. Martin Cook, Chester C. Davis, Frank William Gay, Levar Beebe Myler, John Morrison Holmes, Jr., Homer Hone Clark, M.D., Howard Lorenzo Eckersley, James H. Rickard, Wilbur Sutton Thain, M.D., and Norman Francis Crane, M.D., Counterdefendants. No. CV 79-02374 HP.

. . .

INTERROGATORY NO. 11:

With respect to the allegation contained in paragraph 34 of your counterclaim herein to the effect that there was a "continuous scheme and course of conduct on the part of plaintiff, counterdefendants and others, (hereinafter referred to as the 'Davis-Gay Group')," state:

(a) State in detail each fact presently known to you which forms the basis of this allegation;

(b) Identify each person who has any knowledge of the facts which form the basis of this allegation and set forth in detail the facts that each such person knows;

(c) Identify each document relating to, or referring to, the matters contained in this allegation or in the answer to this Interrogatory;

(d) Identify each person who supplied the infor-

mation contained in your answer to this Interrogatory, and set forth precisely what information was supplied by each such individual.

ANSWER:

From and after the early 1960's, Howard Hughes began a lifestyle of seclusion, which lifestyle was at first a product of Mr. Hughes' personal eccentricities, health and the drugs he was taking. At about this time he began his isolation from all outsiders other than his aides and the Davis-Gay group. That group, and later others, saw the opportunity to control Mr. Hughes and his wealth and business affairs, a large portion of which were and are located in Nevada. Even before this time, Gay and Henley had been in charge of providing Mr. Hughes with the people who looked after Mr. Hughes personally, such as drivers, messengers, errand-boys, personal secretaries and the like. These people were first employed to attend personally to Mr. Hughes around the clock (hereinafter "aides") in about 1961, and Gay, Glenn and Henley thereafter continued to seize the opportunity to supply aides to Mr. Hughes which were, in fact, first loyal to Gay, Glenn and Henley, and later to the "Davis-Gay" group. Through the aides, the Davis-Gay group manipulated Mr. Hughes, controlled most of his contacts with the outside world, fostered his dependence on drugs and misused and wasted his assets.

The counterclaim defendants had the opportunity, the means and the motive to jointly undertake the plan to take Mr. Hughes' wealth and businesses from him. The opportunity presented itself through Mr. Hughes' eccentric and reclusive behavior and his dependence on the drugs which they supplied him. The means were the group's control of those assigned to him personally, and the motive was greed.

Though some of the mechanisms of the conspiracy had been available to Gay as early as 1961, the domination and

control of Summa Corporation, through domination and control of Mr. Hughes, began to bear fruit when, in November, 1966, Mr. Hughes arrived by train from Boston and was transferred to the penthouse of the Desert Inn Hotel in Las Vegas, Nevada. Hughes was isolated in that Hotel until November of 1970, cloistered only with the aides in his physical presence, with the exception of a few visits from his physicians and only occasional telephone calls to those outside his small bedroom. The mechanism of physical isolation was complete from November, 1966, to Hughes' death in 1976 by virtue of the physical control of Hughes and his dependence upon the aides an doctors and ultimately the Davis-Gay group.

After the Davis-Gay group had accomplished control of Hughes personally, control of his business interests in Nevada and his money was the next step. As part of the conspiracy it was necessary that Hughes be supplied with a constant barrage of communications from his staff regarding his business. In this way, the counterclaim defendants engaged in a charade in order to deceive Hughes and to make it appear to others that Hughes still maintained control of his empire.

From the time Mr. Hughes came to Las Vegas, Nevada in late 1966, through the date of his departure from Las Vegas in 1970, the power of the Davis-Gay group increased to the extent that complete domination of Hughes and his affairs by the group was essentially achieved. Summa believes that as early as 1966, a plan had evolved whereby Gay and other counterclaim defendants could gain control of Hughes and his companies. During this period Gay suggested to Robert Maheu and in 1970 to Dr. Robert Buckley and Robert Maheu, the possibility of having Hughes committed as an incompetent, but this was never accomplished. Subsequently, Gay testified under oath on July 14, 1977,

that he had "never heard anyone discuss" Hughes' incompetency or putting Mr. Hughes under guardianship. Nevertheless, in May of 1975, Hughes expressed concern to Jack Real that Gay had a plan to have him put under the care of a trustee. When this concern was communicated by Real to Davis in 1975, Davis replied "Well, he (Hughes) may be right." In late 1972, John Holmes attempted to communicate to Hughes the true situation in his empire, i.e., that Hughes had lost control and that the Gay-Davis group were running all his businesses. Before Holmes was able to inform Hughes, the Davis-Gay group got wind of this and Holmes was immediately threatened with the loss of his job if he proceeded. As a result, the letter Holmes had written to Mr. Hughes was destroyed, Holmes capitulated to the threats of the Davis-Gay group and continued to cooperate with the conspirators.

The following two examples illustrate the control that Gay had achieved in furtherance of the entire scheme. In 1965, after Hughes learned that counterclaim defendant Gay had created a corporation called Hughes Dynamics, Inc., without his approval, Hughes directed that Gay be fired. However, because of the control that Gay had already established by that time, coupled with Hughes' isolation and drug use, Gay remained employed. As further evidence of his power, the corporate headquarters was never fully moved from California to Nevada, despite Hughes' instructions to do so, simply because Gay didn't wish to move. In 1975, when Hughes was informed of this by an aide, he was extremely upset but was later told by another aide, Clarence Waldron, that actually only an answering service was still located in California. In fact, until his death, Hughes was kept from the truth that Gay continued to maintain lavish offices in Encino, and that he had them lavishly and re-

peatedly remodeled. Gay described the office in a November 14, 1974, memo to Hughes as "niggardly."

At least as early as November, 1970, the Davis-Gay group and their co-conspirators were in sufficient control of Hughes personally through the aides, and his businesses through enough of his executives and lawyers who were controlled by the group, that no impartial outsider could objectively examine the acts and omissions of the group. At that time, the group wrongfully obtained Hughes' proxy to run the bulk of his Nevada operations, to the exclusion of the Oil Tool Division. The proxy was executed and notarized in Nevada and, based on the mystery surrounding its execution, the signature may have been obtained by undue influence, duress or other improper means.

At that time Hughes had been critically ill for weeks. His supply of drugs had apparently been increased, and his consumption of codeine soared to the highest levels of his entire life despite his already weakened physical condition. He was afflicted with anemia and pneumonia, in addition to his drug habituation, and was given transfusions by Dr. Harold Feikes. Pursuant to the powers contained in the proxy, the group proceeded to oust Robert Maheu as head of Hughes Nevada Operations. Two weeks after the Nevada proxy to Hughes' executives, now dominated by the Davis-Gay group, Hughes was moved from Las Vegas to the Bahamas, and later from there to Nicaragua, Vancouver, Nicaragua, London, back to the Bahamas and then to Acapulco from which his death flight originated. The group thereafter concealed their wrongdoings, acts and omissions by secrecy and obstruction until both Davis and Gay were removed from all positions of authority in the company, and thereafter departed, the last being Gay on February 28, 1978.

Even though practical control of Hughes' operations other than the Oil Tool Division had been achieved during the time that Hughes was isolated in Nevada, the executives of the Oil Tool Division still were able to exercise some restraint on the operations outside Houston. Despite the proxy which vested control of Nevada Operations in Gay and Davis, the conspirators knew that the Tool Division must be severed from the rest of Hughes' businesses if they were to succeed with their plan. They began by systematically discrediting the Oil Tool Division and the realiability of its officers. Simultaneously the Davis-Gay group furthered the aims of the conspiracy by communicating to Hughes misleading information regarding casino operation profits, Maheu's past wrongs, Gay's virtues, and the value to Hughes of various business ventures which were, in fact, mere examples of self dealing by the Davis-Gay group.

In 1972, with the sale to the public of the Oil Tool Division, Hughes' last loyal group of employees who could act to diminish control by the Davis-Gay group vanished from Hughes' executive corps. At about the same time, Henley, Davis, Myler and Holmes joined Gay on the board of directors and Gay, Henley, and Davis became the executive committee of Summa Corporation, thus solidifying their grasp on Summa. With control of Summa secure, the Davis-Gay group continued their mismanagement and waste of Mr. Hughes' assets, and began a wholesale raid on company property. To maintain their control and achieve the goals of the conspiracy, counterclaim defendants Gay, Davis, Henley, Myler and Holmes obtained gaming licenses in Nevada and transacted business in Nevada. At this point, there was literally no one left who could operate as a buffer between the counterclaim defendants and their control of Hughes and his wealth. Hughes was totally isolated from the outside world, had greatly diminished mental and phys-

ical ability, and was increasingly dependent on drugs. The outside world knew none of this. From this point to the date of his death, Hughes was nothing more than a ward of the Davis-Gay group, and they ran his personal and business affairs evidencing no regard for his wishes or the standard of care to which they knew or should have known they would be subject.

They manipulated Hughes behind a shroud of isolation and secrecy during the years he lived. They misrepresented the state of his health and his business judgment in order to deceive the outside world about his condition. The Gay-Davis group, by their continued refusal to return corporate documents in their possession, persist in their obstructionist behavior even to the present. It was not until March of 1977, a year after Hughes' death, that numerous documents in Hughes' handwriting were located in the Bahamas. These documents had been forwarded to those islands by Kay Glenn after the Romaine Street "break-in" in 1974 and had been secretly stored there since. Counterclaim defendant Glenn had previously suppressed knowledge of the location of documents relating to L.A. Airways shipped to the Bahamas as following Hughes' departure from Las Vegas. As another example of the secrecy and concealment the Davis-Gay group employed, valuable corporate records were shredded in Mexico at or about the same time that Mr. Hughes died enroute to Houston, Texas. The practice of destroying important documents is believed to have continued throughout the period of domination by the group. The Gay-Davis group utilized the means and the opportunity presented them to isolate Mr. Hughes and enrich themselves at his and his companies' expense.

(b) The last known address is given for each person.

Dr. Robert Buckley
2300 Rancho Road
Las Vegas, Nevada 89102

Eric Bundy
P.O. Box 204
Hurricane, Utah 84737

Dr. Lawrence Chaffin
132 North Hudson Avenue
Los Angeles, California 90004

Dr. Homer Clark
2123 Park Way Avenue
Salt Lake City, Utah

Rand H. Clark
9236 Shoshone Avenue
Northridge, California 91325

D. Martin Cook
1337 S. Empire Street
Anaheim, California 92802

Dr. Norman Crane
2308 Coldwater Canyon Drive
Beverly Hills, California

Roy Crawford
17360 Palora Street
Encino, California 91316

Clyde Crow
RFD 1 Box 479
Spanish Fork, Utah 84660

Chester Davis
901 Lexington Avenue
New York, New York

Howard Eckersley
2219 Lauri Kay Drive
Salt Lake City, Utah 84117

George Francom
2820 Oakland Circle
Bloomington, Utah

Keith Carver
536 N. Bundy Drive
West Los Angeles, California

F. W. Gay
18005 Rancho Street
Encino, California 91316

Kay G. Glenn
52 Country Club Ln.
Las Vegas, Nevada 89109

Nadine Henley
El Camino Towers
1830 Avenida del Mundo
Coronada, California 92118

Rea Hopper
334 S. Cliffwood Avenue
Los Angeles, California 90049

John Holmes
10342 Dunleer Drive
Los Angeles, California 90064

Howard Jaffe
One State St. Plaza
New York City, New York 10004

Robert Maheu
3523 Cochise Lane
Las Vegas, Nevada 89109

Gordon Margulis
Unknown

Dr. Victor Manuel Montemayor
Costera M. Aleman No. 165
Acapulco, Mexico

Levar Myler
1986 E. Johnston Drive
Sandy, Utah

V.C. Olson
4045 S. Spencer
Las Vegas, Nevada 89156

John Pettit
1145 South El Molino
Pasadena, California 91106

Bruce Stedman
1666 Kennedy Causeway
No. Beach Village, Florida

Jack G. Real
4045 S. Spencer
Las Vegas, Nevada 89156

James Rickard
1157 South Lynwood Drive
Orem, Utah 84057

Dr. Walter Robinson
111 Harley Street
London WIN IDG

Mel Stewart
453 Kayenta Circle
Cedar City, Utah 84720

A. Allen Stroud
713 Escalante Drive
St. George, Utah 84770

William E. Rankin
4045 S. Spencer
Las Vegas, Nevada 89156

Dr. Wilbur Thain
1856 N. 1200 East
Logan, Utah 84321

Clarence A. Waldron
3225 S. Torrey Pines
Las Vegas, Nevada 89102

Paul Winn
4045 S. Spencer
Las Vegas, Nevada 89156

Ralph Winte
4045 S. Spencer
Las Vegas, Nevada 89156

Dr William Young
64 Harley Street
London W.1. England

Raymond D. Fowler
P. O. Box 2968
University of Alabama
University, Alabama

Clifford J. Weisman
6958 Montcliff
Las Vegas, Nevada 89117

W. R. Lummis
4045 S. Spencer
Las Vegas, Nevada 89156

Dr. James C. Fletcher
7721 Falstaff Road
McLean, Virginia 22101

Dr. Charles M. Taylor
435 N. Bedford
Beverly Hills, California

(c) See Answer to Interrogatory No. 2.

(d) Although Summa documents are one source of information to this interrogatory, information concerning Mr. Hughes' living habits, his drug addiction and the dates of certain corporate transactions have been supplied by the depositions and statements of the counterclaim defendants in other cases. In addition to counterclaim defendants, Paul Winn, Jack Real, George Francom, Mel Steward, Gordon Margulis, Dr. Chaffin, V.C., Olson, W.E. Rankin, Dr. Crane, Dr. Buckley, and Robert Maheu have supplied such information.

. . .

INTERROGATORY NO. 34:

With respect to the allegation contained in paragraph 42 of your counterclaim herein that "on or about November

25, 1970, Crane, Eckersley, Holmes, Myler and Glenn, secretly removed Hughes by jet from Nevada to the Bahamas," do you contend they did so against the will of Hughes?

ANSWER:

See Answers to Interrogatories Nos. 33.(a) and 35.(a).

INTERROGATORY NO. 35:

If your response to Interrogatory No. 34 is in the affirmative, state:

(a) State in detail each fact presently known to you which forms the basis of this allegation;

(b) Identify each person who has any knowledge of the facts which form the basis of this allegation and set forth in detail the facts that each such person knows;

(c) Identify each document relating to, or referring to, the matters contained in this allegation or in the answer to this Interrogatory;

(d) Identify each person who supplied the information contained in your answer to this Interrogatory, and set forth precisely what information was supplied by each such individual.

ANSWER:

(a) See Answer to Interrogatroy No. 33.(a); If Mr. Hughes was sufficiently able to form an intention at the time, Summa believes that the named counterclaim defendants may have transferred Mr. Hughes from Nevada to the Bahamas against his will or that the counterclaim defendants misled him as to the advisability or necessity for the move. The conspirators removed Hughes from Nevada in order that others could not interfere with the illegitimate and illegal objects of the conspiracy. After a legal contest over the proxy, a Nevada District Court, ruled in favor of the validity

of the proxy. That Court was misled by the Davis-Gay group by the affidavits and testimony offered by members of the group, and that testimony was critical to the validity issue. Dr. Homer Clark signed an affidavit as to Hughes' good health despite Clark's knowledge of Hughes' circumstances. Chester Davis directed that trial in Nevada and obstructed inquiry into Mr. Hughes' health. Hughes was no longer in a position to exercise his free will and during a series of moves subsequent to the Bahamas relocation, the counterclaim defendants manipulated him so that he could not exercise control of his business and concealed his true condition.

(b) See Answer to Interrogatory No. 33.(b).

(c) See Answer to Interrogatory No. 2.

(d) See Answer to Interrogatory No. 32.(b).

. . .

INTERROGATORY NO. 41:

With respect to the allegation contained in paragraph 46 of your counterclaim herein to the effect that there was a "continuous scheme and course of conduct on the part of plaintiff, counterdefendants and others, (hereinafter referred to as the 'Davis-Gay Group')," state:

(a) State in detail each fact presently known to you which forms the basis of this allegation;

(b) Identify each person who has any knowledge of the facts which form the basis of this allegation and set forth in detail the facts that each such person knows;

(c) Identify each document relating to, or referring to, the matters contained in this allegation or in the answer to this Interrogatory;

(d) Identify each person who supplied the information contained in your answer to this Interrogatory, and set forth precisely what information was supplied by each such individual.

ANSWER:

(a) See Answers to Interrogatory 11.(a). At the present time, Summa is not certain whether or not Hughes was informed or approved of the election of these counterclaim defendants to the new board. The mysterious manner in which these individuals were appointed to the board leads to the suspicion that, in fact, they were not properly elected at all. There is no satisfactory documentary evidence to indicate that compliance with corporate procedures and by-laws was accomplished. Even if Hughes was competent and approved of these actions, any such purported approval is meaningless as it may have been obtained by undue influence and duress, or without full and candid disclosure of all material facts.

(b) See Answer to Interrogatory No. 13(b).

(c) See Answer to Interrogatory No. 2.

(d) See Answer to Interrogatory No. 13(b).

. . .

INTERROGATORY NO. 79

Do you contend that the employment and/or consulting contracts referred to in your answer to Interrogatory No. 78 above were obtained without the knowledge and/or approval of Hughes?

ANSWER:

At the present time, Summa does not know whether Hughes was informed of or approved the employment and/or consulting agreements. In any event, Hughes was not mentally competent to give approval and that fact was or should have been known to the counterclaim defendants. Even if Hughes was competent and approved of the con-

tracts, the purported approval is meaningless because it was obtained by undue influence and duress, or without full and candid disclosure of all material facts.

. . .

Dated: Oct. 26, 1979.

KINDEL & ANDERSON
MALCOLM GEORGE SMITH
CARLOS SOLIS
GEORGE L. O'CONNELL

/s/ Malcolm George Smith
Malcolm George Smith
Attorneys for Defendant and
Counterclaimant Summa
Corporation

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No. 80-2137

IN THE

Supreme Court of the United States

October Term 1980.

CHESTER C. DAVIS, DAVIS & COX, MAXWELL E. COX, HOWARD M. JAFFE, and D. MARTIN COOK,

Petitioners,

vs.

SUMMA CORPORATION, HUGHES PROPERTIES, INC., and HUGHES AIR CORP.,

Respondents.

Response to Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

IRELL & MANELLA,
ROBERT L. WINSLOW,
STEVEN L. SLOCA,
AGATHA M. MELAMED,
By AGATHA M. MELAMED,
Attorneys for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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Petitioners,

vs.

SUMMA CORPORATION, HUGHES PROPERTIES, INC., and HUGHES AIR CORP.,

Respondents.

Response to Petition for Certiorari to the United States Court of Appeals for the Ninth Circuit.

The Respondents, SUMMA CORPORATION, HUGHES PROPERTIES, INC., and HUGHES AIR CORP., respectfully pray that a writ of certiorari not be issued to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on March 16, 1981.

Opinion Below.

The memorandum opinion of the Court of Appeals, which is unpublished, appears in Appendix A to the Petition for Writ of Certiorari. No opinion was rendered by the District Court for the Central District of California.

Statement of the Case.

Davis and Cox filed this action in the United States District Court for the Central District of California to recover legal fees and costs allegedly owed to them by Summa Corporation. Summa, along with Hughes Air Corporation and Hughes Properties, Inc. (hereinafter referred to as "Summa"), then filed counterclaims concerning a series of improper activities which occurred during the ten-year period prior to the death of Howard Hughes. The second amended counterclaims, the subject of this action, are posited on undue influence, and breach of contractual and fiduciary duty.

Count One alleges that the counterdefendants conspired to gain control of Hughes' corporate and personal assets, and once they were in control, they misappropriated those assets for their personal benefit. This claim is grounded on breach of the fiduciary duties owed to Hughes, and breach of contractual duties of fairness and good faith. Counts Two and Three claim that excessive employment and consulting contracts for the counterdefendants were entered into and approved of in breach of fiduciary duties owed to Hughes and Summa. Count Two alleges that the directors of Summa approved their own contracts and Count Three alleges that the contracts were approved pursuant to the conspiracy. Count Four claims that the counterdefendant directors are liable for acts of waste, mismanagement, and negligence performed in connection with their operation of Summa. The claim is grounded on breach of fiduciary duties. Count Five is directed toward the attorneys and primarily alleges legal malpractice and breach of the fiduciary and implied contractual duties owed to Hughes and Summa. Count Five also alleges that the attorneys' actions were part of the conspiracy. Despite the fact the second amended counterclaims are not posited on fraud, the District Court dismissed

them, under Rule 9(b) of the Federal Rules of Civil Procedure for failure to plead fraud with sufficient particularity. This erroneous dismissal was with prejudice, and was entered pursuant to Rule 41(b). The order was then entered under Rule 54(b) as a final judgment of dismissal against Summa. Shortly thereafter, the trial court enjoined respondents from pursuing its counterclaims in a similar action then pending in Nevada state court.

On March 16, 1981, the Ninth Circuit reversed the judgment of the trial court, finding that the dismissal was improper. This decision was grounded on the finding that none of the allegations in the counterclaims constitute a common law fraud claim. The court further found that even if Rule 9(b) were applicable, the counterclaims more than satisfy the dictates of Rule 9(b) (Petition for Certiorari, Appendix A — hereinafter referred to as "Opinion Below" — at 6).

Reasons the Writ Should Not Be Granted.

A. The Requirements of Rule 9(b) Do Not Apply to the Instant Case.

The court below correctly holds that the allegations contained in Summa's second amended counterclaims do not constitute a common law fraud claim. Rather, they are allegations of undue influence, and breach of fiduciary and contractual duty (Opinion Below at 3-4, 6). The court below does not assert that the allegations have penetrated the ill-defined penumbral area surrounding common law fraud; rather, it merely suggests that, to the degree the allegations *could* be so viewed, they nevertheless more than satisfy the

dictates of Rule 9(b) (Opinion Below at 6).[1] The court was correct in this analysis; Summa has met and exceeded the most stringent requirements of particularized pleading, even though Rule 9(b) is not actually applicable to the instant case. The determinative fact, however, is simply that Rule 9(b) is inapposite, given that the second amended counterclaims are not based on allegations of fraud. Indeed, petitioners do little to rebut this finding (Petition for Certiorari — hereinafter referred to as "Petition" — at 6). It would thus be inappropriate for the court to grant certiorari merely to examine the Ninth Circuit's discussion of Rule 9(b) in this case, given that the discussion is essentially dicta.

B. There Is No Conflict Among the Circuits in the Application of Rule 9(b).

In the instant case, no important questions in the administration of the Federal Rules of Civil Procedure are presented. Despite petitioner's assertion to the contrary (Petition at 6), there is no divergence in the circuit's application of the particularity requirement of F.R. Civ. P. 9(b). Indeed, the differing outcomes evidenced in the Ninth, Seventh, and Second Circuit cases cited by petitioner are not caused by a difference in interpretation of the particularity requirement, but rather by the differing factual patterns in the cases themselves. Therefore, certiorari is inappropriate.

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[1]Though Summa's second amended counterclaims do allege undue influence, and breach of fiduciary and contractual duty, they do not allege fraud. The pleading requirements for non-fraud claims differ from those sounding in fraud. For example, in *Spiegler v. Wills*, 60 F.R.D. 681 (S.D.N.Y. 1973), after dismissing a second amended complaint (with leave to replead) for failure to satisfy the 9(b) particularity requirement, the court noted, "If this were a civil case other than one posited on fraud — such as a claim sounding in negligence, or breach of fiduciary duty — the requirement for a sufficient pleading would be quite different." *Id.* at 683. Similarly, the Rule 9(b) particularity requirement does not apply in the instant case, which is not based on fraud.

Petitioners cite *Bosse v. Crowell, Collier, and MacMillan*, 565 F.2d 602 (9th Cir. 1977); *Tomera v. Galt*, 511 F.2d 504 (7th Cir. 1975); and *Walling v. Beverly Enterprises*, 476 F.2d 393 (9th Cir. 1973) for the proposition that the Ninth and Seventh Circuits maintain a "lax approach" as to what the particularity requirement really means. (Petition at 6). However, in each of these cases the circumstances constituting fraud were specifically pleaded. As stated by the Ninth Circuit in *Bosse*, "While mere conclusory allegations of fraud will not suffice, statements of the time, place and nature of the alleged fraudulent activities will." *Bosse, supra*, at 611. This is far from a lax approach. For example, in *Bosse*, plaintiffs maintained a securities law claim, based in part on section 10(b) of the 1934 Securities Exchange Act (15 U.S.C. §78j(b)) and Rule 10b-5 thereunder (17 CFR §240.10b-5). The "manipulative or deceptive device" alleged in this claim was defendants' establishing a debtor-creditor relationship with plaintiffs via a loan and pledge arrangement, with the underlying intent or purpose of gaining control of plaintiff's company. *Bosse, supra*, at 611. The transactions in question were pleaded with specificity as to time, place, content, and parties. *Id.* at 605-06. So too in *Walling*, another case involving fraudulent intent, plaintiffs similarly pleaded a specific fraudulent transaction. *Walling, supra*, at 395. In the Seventh Circuit case, *Tomera*, involving fraudulent misrepresentations, the plaintiff recited the date and express content of the false statement made by defendant president of a mining company concerning the existence of the company's mining operations. *Tomera, supra*, at 508. Given these facts, it is difficult to see how the courts were lax in holding that plaintiffs satisfied the particularity requirement of Rule 9(b).

These cases have a striking factual contrast to *Denny v. Barber*, 576 F.2d 465 (2nd Cir. 1978) and *Segal v. Gordon*,

467 F.2d 602 (2nd Cir. 1972), cited by petitioners as examples of a "stricter approach". (Petition at 6-7). In both of these cases, no specific transactions were pleaded. *Denny, supra,* at 469; *Segal, supra,* at 608. It is no surprise that the Second Circuit held that "[u]nder the circumstances, such a pleading does not 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " *Denny, supra,* at 469. Indeed, the same fair notice criteria is applied in the Ninth and Seventh Circuits. *See Bosse, supra,* at 611; *Tomera, supra,* at 508, *Walling, supra,* at 397. When fraud is alleged, specificity is required to satisfy the fair notice requirement; this is because fraud embraces such a wide variety of potential conduct that a defendant needs a substantial amount of particularized information about plaintiff's claim in order to enable him to understand it and effectively prepare his response. *See* 5 *Wright and Miller, Federal Practice and Procedure* §1296, at 400 (1969). Thus, the specificity standard, while serving the major purpose of Rule 9(b) of giving adequate notice of plaintiff's claim of fraud, is in harmony with Rule 8, which requires that averments in pleadings be concise and direct. *McGinty v. Beranger Volkswagen, Inc.*, 633 F.2d 226, 228 (1st Cir. 1980).

The specificity standard also serves other purposes, one of which is the protection of the defendant's reputation or goodwill, when charged with serious wrongdoing. *Ross v. A.H. Robins Co.*, 607 F.2d 545 (2nd Cir. 1979), cert. denied 446 U.S. 946 (1980). However, there is no conflict between the purposes of fair notice and protection of reputation (Petition at 8). Indeed, in *Ross* itself, the Second Circuit emphasized the fact that a defendant is entitled to a "reasonable opportunity to answer the complaint and must be given adequate information to frame a response." *Ross, supra,* at 557-58. The court then went on to evaluate the

complaint using this criteria. Thus, satisfaction of the fair notice requirement itself serves to protect the reputation of the defendant by requiring plaintiffs to supply a factual basis for their allegations regarding defendants' knowledge.[2] Similarly, in *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373 (D.C. Cir. 1981) the court held that the requirement that the pleader state the time, place, and content of false representations, while serving the purposes of discouraging nuisance suits and frivolous accusations of moral turpitude, also guarantees "all defendants sufficient information to allow for preparation of a response." *Id.* at 1385.[3]

---

[2]In *Ross*, the Seventh Circuit held that plaintiff must specifically plead those events that give a strong inference that the defendants had knowledge of the health risks endemic in their product, the Dalkon Shield contraceptive device, and the time that they obtained that knowledge. *Ross v. A.H. Robins Co.*, 607 F.2d 545, 558 (2nd Cir. 1979), cert. denied 446 U.S. 946 (1980). This is entirely consistent with *Tomera v. Galt*, 511 F.2d 504 (7th Cir. 1975), for in *Tomera*, the plaintiff alleged that the president of the mining company made statements that the company held valid mine leases and that it was carrying on silver mining operations, neither of which was true. By alleging that the statements were made by the company president, the existence of the knowledge of company operations was implicit. In *Ross*, on the other hand, it was not evident that the defendants were aware of the health risks endemic to the Dalkon Shield at the time alleged. Therefore, greater specificity was required to give defendants adequate information to frame a response to the charge of fraud.

The Ninth Circuit cases cited by petitioners, *Bosse v. Crowell, Collier and MacMillan*, 565 F.2d 602 (9th Cir. 1977) and *Walling v. Beverly Enterprises*, 476 F.2d 393 (9th Cir. 1973), are also consistent with *Ross*, in that they dealt with fraudulent intent rather than with knowledge of a specific fact; thus no necessity for the pleading of specific knowledge existed in those cases.

[3]*United States ex rel. Joseph v. Cannon*, 642 F.2d 1373 (D.C. Cir. 1981) is another case in which the alleged fraudulent transaction was not pleaded with particularity. Plaintiff alleged that members of a Senator's staff, while collecting their government salaries, rendered personal services for the Senator and his family. However, the complaint failed to state which members of the Senator's staff were involved, what services were performed, when the activities occurred, and even whether there was any neglect of official duties. *Id.* at 1385-86.

As indicated above, there is simply no conflict among the circuits as to the meaning of the particularity requirement under Rule 9(b). As will be discussed below, this requirement is nonetheless satisfied by the Summa counterclaims.

C. The Summa Counterclaim Have Satisfied the Rule 9(b) Particularity Requirement.

The Ninth Circuit was correct in finding that Summa has set forth much more than conclusory allegations. It has included the time, place, and nature of many of the alleged wrongful activities, including those supported by information and belief. Each of the counterdefendants is identified, and his or her fiduciary obligations clearly stated. (Petition, Appendix B — hereinafter referred to as "Counterclaims" — ¶¶29-44 at 11-15.) Their individual and collective rise to positions of absolute control over the affairs and finances of Summa and Howard Hughes is closely chronicled. (Counterclaims, ¶¶47-55 at 22-24.) Hughes' drug dependencies and mental disabilities are described, as are the means used by the counterdefendants to exploit those tragic weaknesses. (Counterclaims, ¶45 at 16-22, ¶¶56-84 at 24-37.)

More than mere neutral conduct is alleged. Counterdefendants' abuses of their power over Hughes and his companies are exhaustively detailed (Counterclaims, ¶58 at 29-32). Use of company funds for personal purposes is particularized by date and amount, including, for example, the support and education of children and friends of counterdefendants Gay, Eckersly, Myler, and Holmes, and the improvement of a farm owned by counterdefendant Davis' wife (Counterclaims, ¶¶58(c)(1), 58(c)(6)). These are not neutral acts — the court below properly notes that these alleged activities are wrongful. (Opinion Below at 8).

Contrary to the assertion of petitioners (Petition at 8), other courts of appeals do not prohibit allegations based on

information and belief in all circumstances. Such allegations satisfy the particularity requirement when accompanied by a statement of the facts upon which the belief is founded. *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374, 379 (2nd Cir. 1974), cert. denied 421 U.S. 976 (1975). This is precisely what Summa has done. Paragraph 57 of the second amended counterclaims sets forth the factual basis for its allegation made on information and belief, referring when appropriate to facts alleged on knowledge elsewhere in the pleading.

In addition, the rule relating to information and belief may be relaxed as to matters particularly within the opposing parties' knowledge. *Schlick, supra; Spiegler v. Wills*, 60 F.R.D. 681, 683 (S.D.N.Y. 1973). This is particularly true when the claimant does not enjoy full information about the manner in which the corporation's internal affairs were conducted. *Id.* The applicability of this standard in the instant case is evident, given the intensely guarded and unique nature of the operations of the Hughes companies prior to Hughes' death (Opinion Below at 8). The court below also correctly notes that less particularity is required when the fraud is directed against a third party, *Allegaert v. Perot*, 78 F.R.D. 427 (S.D.N.Y. 1978), and when the events encompassing the alleged fraud have happened over a lengthy period of time and there are many individuals involved. *In Re Equity Funding Corporation of America Securities Litigation*, 416 F.Supp. 161, 181 (C.D. Cal. 1976); *Temple v. Haft*, 73 F.R.D. 49, 53 (D. Del. 1976). These factors, evident in the instant case, argue for further leniency in the application of the particularity requirement. The court below is thus correct in finding that, even if Rule 9(b) could be viewed as applicable to the instant case, the Summa second

amended counterclaims have met and exceeded the most stringent requirements of particularized pleading (Opinion Below at 6).

D. The Ninth Circuit's Reversal of the Rule 41(b) Dismissal Was Proper.

Petitioners' response to the Ninth Circuit's holding that the use of Rule 41(b) was improper is another exercise in obfuscation dressed up in the jargon of "dismissal on the merits" and "abuse of discretion." (Petition at 8-9.) However, the point — not even addressed by petitioners — is that Rule 41(b) may not be employed to transform a ruling that a pleading is insufficient into the equivalent of a judgment entered after trial. Such a ruling is res judicata as to the sufficiency of the pleading under the Federal Rules — and no more. Another suit based on the same facts, or the same cause of action, is not barred if brought as a sufficient pleading for the simple reason that no facts have been adjudicated. *See, e.g., Costello v. United States*, 365 U.S. 265, 284-88 (1961). No question of discretion enters into it. The Ninth Circuit's reversal of the Rule 41(b) dismissal was thus proper.

Conclusion.

For these reasons, a writ of certiorari should not be issued to review the judgment and memorandum opinion of the Ninth Circuit.

Respectfully submitted,

IRELL & MANELLA,
ROBERT L. WINSLOW,
STEVEN L. SLOCA,
AGATHA M. MELAMED,
By AGATHA M. MELAMED,
Attorneys for Respondents.